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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 88

ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, AND CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA

FILED MAY 18, 1931

(35,894)

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA

ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE AND Nashville Railroad Company, Charleston & Western Carolina Railway Company, Plaintiffs,

v.

THE UNITED STATES OF AMERICA, Defendant

BILL OF COMPLAINT—Filed Dec. 27, 1930

Atlantic Coast Line Railroad Company, Louisville and Nashville Railroad Company and Charleston & Western Carolina Railway Company bring this, their Bill of Complaint, against the Defendant, The United States of America, and humbly complaining, respectfully aver:

[fol. 4]

I

Atlantic Coast Line Railroad Company is a corporation organized and existing under the laws of the State of Virginia and is a citizen and resident of that State. Louisville and Nashville Railroad Company is a corporation organized and existing under the laws of the State of Kentucky, and is a citizen and resident of that State. Charleston & Western Carolina Railway Company is a corporation organized and existing under the laws of the State of South Carolina and is a citizen and resident of that State.

II

This is a suit of a civil nature in equity. The matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand ($3,000) Dollars. This suit arises under the Constitution and Laws of the United States, and is a proceeding under the Act of Congress

known as the Urgent Deficiencies Act, approved October 22, 1913 (38 Stat. L. 219), the Commerce Court Act approved June 18, 1910, (36 Stat. L. 539) and the Interstate Commerce Act and amendments thereto, and is brought to enjoin and set aside an order of the Interstate Commerce Commission entered under date of June 9, 1930, in a proceeding then pending before said Commission and styled Investigation and Suspension Docket No. 3290. A copy of said order and of the report accompanying same and made a part thereof is attached, as Exhibit No. 1, to this bill and prayed to be taken as a part hereof.

By the said order the Commission has erroneously construed Conditions 3 and 4 of the Clinchfield Lease Case (90 I. C. C. 113), filed as Exhibit herewith) as requiring the Atlantic Coast Line Railroad Company to embrace in through routes substantially less than the entire length [fol. 5] of its railroad and of intermediate railroads operated in conjunction and under common management and control therewith. Said order and requirement is contrary to the provisions of paragraph 4 of section 15 of the Interstate Commerce Act.

III

Plaintiffs attach hereto, as Exhibit No. 2, a map showing the relation of their lines of railroad to each other and to the lines of railroad here involved, and allege:

(a) The railroad of Atlantic Coast Line Railroad Company extends from Richmond, Virginia, through the States of Virginia, North Carolina, South Carolina, Georgia and Florida, to Tampa and points south thereof in Florida, and also through Alabama to Montgomery, Alabama.

(b) The Louisville and Nashville Railroad has a main line extending from Cincinnati, Ohio, through Louisville, Ky., Nashville, Tenn., Birmingham, Montgomery and Mobile, Ala., to New Orleans, La., and another main line extending from Cincinnati, via Knoxville to Atlanta. It also has lines from Louisville via Lexington to sundry points in the eastern Kentucky coal fields and to rail connections therein. It also has lines from [illegible]isville and other points on its Cincinnati-New Orlean[illegible] line, extending to St. Louis, Mo., and Memphis, Tenn. These lines

and their connections serve a large area in southern, southwestern, central and trunk line territories. It has many branch lines in Kentucky, Tennessee, Alabama and Florida. Atlantic Coast Line Railroad Company owns 51% of the capital stock of and thereby controls, said Louisville and Nashville Railroad Company.

[fol. 6] (c) Charleston & Western Carolina Railway Company owns a line of railroad extending from Spartanburg, S. C., through Greenwood, S. C., and Augusta, Ga., to Port Royal, S. C., on the Atlantic Ocean, with branches from Laurens, S. C., to Greenville, S. C., and from McCormick, S. C., to Anderson, S. C., Atlantic Coast Line Railroad Company controls, and for a number of years prior to the Transportation Act 1920 has controlled the operation and traffic policies of Charleston & Western Carolina Railway Company and the railroad of said Company is and since a time long prior to the Transportation Act 1920, has been, operated in conjunction and under common management or control with that of Atlantic Coast Line Railroad Company.

(d) Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company are, and for a number of years prior to the Transportation Act 1920, have been joint lessees of the railroad of Georgia Railroad and Banking Company, which railroad is commonly known as Georgia Railroad and extends from Atlanta, Ga., to Augusta, Ga., with branches to Macon, Ga., and Athens, Ga. The organization set up by Lessees to operate said leased road is also known as Georgia Railroad. The Railroad of Georgia Railroad, together with those of Atlanta and West Point Rail Road and Western Railway of Alabama, are operated in conjunction and under the common control or management with the railroad of Atlantic Coast Line Railroad Company and form a line of railroad extending from a connection with Atlantic Coast Line Railroad Company's lines at Augusta, through Atlanta, Ga., to Montgomery, Ala.

IV

In the year 1923 Atlantic Coast Line Railroad Company [fol. 7] and Louisville and Nashville Railroad Company

filed an application before the Interstate Commerce Commission, under paragraph 2 of section 5 of the Interstate Commerce Act, for authority to acquire control by lease of the properties of Carolina, Clinchfield and Ohio Railway, Carolina, Clinchfield and Ohio Railway of South Carolina and Clinchfield Northern Railway of Kentucky, extending from a connection with the line of the Chesapeake and Ohio Railway Company at Elkhorn City, Ky., through the States of Virginia, Tennessee and North Carolina, to Spartanburg, S. C., and herein sometimes referred to as the Clinchfield Railroad and under section 20a of said Act, for authority to assume obligations as set out in the lease. Said applicants represented to the Commission a desire to secure a through line over Louisville and Nashville Railroad, Clinchfield Railroad, Charleston & Western Carolina Railway, Atlantic Coast Line Railroad and the reverse. The said application was docketed by the Commission as Finance Docket No. 3131. Numerous parties intervened for and against the granting of the application and under date of February 9, 1924, before any decision of the questions involved was made, the Interstate Commerce Commission, through Mr. Commissioner Hall, then Chairman, addressed to each of the parties to said lease proceedings a letter suggesting ten conditions to be imposed by the Commission in the event it granted the application and requesting that the parties make known to the Commission their approval of or objections to the said conditions. Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company, proposed lessees, replied to said letter, a copy of which reply is hereto attached as Exhibit No. 3. In said reply said proposed lessees objected to all of the conditions as proposed except Condition No. 7. Said proposed Lessees, [fol. 8] with reference to Conditions 3 and 4, here involved, objected to certain specified language in said conditions for the reason that if said language remained therein the said conditions might be construed as requiring Atlantic Coast Line Railroad Company, lessee, to become a party to through routes via the Clinchfield Railroad which would shorthaul the line of Charleston & Western Carolina Railway, that part of the Atlantic Coast Line system connecting with the proposed leased line and in support of its said objection specifically set up section 4 of paragraph 15 of

the Interstate Commerce Act as forbidding such short-hauling of Atlantic Coast Line Railroad Company and its system lines. The proposed lessees, in said reply, stated to the Commission that Conditions 3 and 4 as proposed were beyond the power of the Commission and that they would not accept the lease unless Conditions 3 and 4 were either eliminated or so changed as not to require such short hauling.

The Receiver of the Georgia and Florida Railroad, who had intervened in said lease proceeding, in his reply to the said letter proposing conditions, requested that the Commission enlarge Conditions 3 and 4 so as to provide not only that existing routes and channels of trade and commerce theretofore established by other carriers in connection with the Clinchfield should be preserved, but also that reasonable new routes and channels of trade might thereafter be established and maintained with the approval of the Commission.

By its report and order in the said Clinchfield Lease Case (90 I. C. C. 113) the Commission approved the lease subject to five conditions, including Conditions 3 and 4, above referred to, but changing the language of Conditions 3 and 4 in the particulars requested by Atlantic Coast Line Rail-[fol. 9] road Company and Louisville and Nashville Railroad Company, proposed lessees and refusing to enlarge the language as requested by the Receiver of the Georgia and Florida Railroad.

Plaintiffs allege that the purpose of the changes so made in said conditions was intended to and did conform the conditions to the position of said joint lessees as set out in their said reply and they, therefore, accepted the lease subject to the modified conditions as written in said report and order of the Commission. A copy of said report and order is attached as Exhibit No. 4.

V

In accordance with the requirement of Conditions 1 of the Clinchfield Lease Case, Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company, joint lessees, set up an operating organization known as Clinchfield Railroad Company. Through said lease and its ownership of 51 per cent. of the stock of Louisville and

Nashville Railroad Company, Atlantic Coast Line Railroad Company controls the operation and traffic policies of said Clinchfield Railroad Company.

VI

Plaintiffs allege that at all times since the making of the Clinchfield Lease, above referred to, the said leased line known as Clinchfield Railroad, and the line of railroad of Charleston & Western Carolina Railway and the line of railroad of Georgia Railroad, as well as other lines of railroad, have all been operated in conjunction and under common management or control with the railroad of Atlantic Coast Line Railroad Company within the meaning of paragraph 4 of section 15 of the Interstate Commerce Act.

[fol. 10] VII

Plaintiffs allege that the said lessees of the Clinchfield have, since the making of said lease, fairly, carefully and fully complied with all of the conditions of said lease and particularly with Conditions 3 and 4 thereof; that no route or channel of trade then existing via the Clinchfield has been closed or otherwise interfered with; that no gateway for the interchange of traffic with the line of the Clinchfield has been closed; that the neutrality of handling traffic via the Clinchfield then existing has been maintained; and that there has been no discrimination in rates, fares or charges.

VIII

Under date of December 23, 1926, the Interstate Commerce Commission, by its report and order in Reorganization of Georgia and Florida Railway (117 I C. C. 473) authorized the new company (Georgia and Florida Railroad Company) to construct a line of railroad extending from the northern terminus of its said line at Augusta, Ga., through Edgefield, S. C., to Greenwood, S. C., at which point the said new line would connect with the line of the Piedmont and Northern Railway Company, an electrically operated common carrier by railroad subject to the Interstate Commerce Act. The said line of Georgia and Florida Company from Augusta to Greenwood is shown in yellow

lines on the map filed as Exhibit 2 and herein sometimes referred to as the Greenwood Extension and was opened for operation on June 1, 1929. The said Greenwood Extension, when constructed and put into operation on June 1, 1929, for the first time provided, together with the Piedmont and Northern Railway Company, a new line of rail-
[fol. 11] road between Augusta, Ga., and Spartanburg, S. C., roughly paralleling the line of Charleston & Western Carolina Railway Company between said points.

IX

Prior to the construction of said Greenwood Extension of the Georgia and Florida Railroad, the said Clinchfield, Charleston & Western Carolina Railway Company, Atlantic Coast Line Railroad Company and Georgia Railroad were parties to through routes and rates for the movement of traffic southbound over the lines of said Clinchfield and Charleston & Western Carolina Railway to Augusta, Ga., and thence via the lines of Atlantic Coast Line, Charleston & Western Carolina Railway, or Georgia Railroad to destination and also in the reverse direction over said lines. Said routes and rates were used constantly in the movement over said system lines of large quantities of through interstate freight traffic. Any movement of such through traffic by the Georgia and Florida Railroad over the Greenwood extension between Augusta and Greenwood would "shorthaul" the line of the Charleston & Western Carolina Railway between said points. On traffic moving southbound over the lines of the Clinchfield Railroad Company to Spartanburg, thence over the lines of the Piedmont and Northern and Georgia and Florida Railroad Company through Augusta to Vidalia, thence over the line of the Georgia and Florida Company or Seaboard Air Line Railway Company to points south of Vidalia and also movements in the reverse direction via said lines such movement would shorthaul the lines of the Atlantic Coast Line system south of Spartanburg, S. C. By reason of the provisions of paragraph 4 of section 15 of the Interstate Commerce Act neither Atlantic Coast Line Railroad Company nor Charles-
[fol. 12] ton & Western Carolina Railway Company could be compelled to become a party without its consent to any such through route via the lines of the Greenwood extension

of the Georgia and Florida Railroad Company. Plaintiffs allege that neither of said companies has ever so consented.

X

Prior to the completion of the construction and opening to operation by Georgia and Florida Railroad Company of its Greenwood extension, Atlantic Coast Line Railroad Company, Charleston & Western Carolina Railway Company, Georgia Railroad and the lessee organization known as Clinchfield Railroad Company published or caused to be published in, or as supplements to, applicable tariffs on file with the Interstate Commerce Commission certain restrictive schedules designed and appropriate to make the through rates, published by or for account of said railroads on traffic moving northbound or southbound over the Clinchfield Railroad from, to or through Augusta, Ga., not applicable if the traffic was moved between Greenwood, S. C. and Augusta, Ga., over the Greenwood extension of the Georgia and Florida Railroad. The purpose of these restrictions was to preserve to the said Atlantic Coast Line Railroad Company and its system line, the Charleston & Western Carolina Railway, the long haul protected by the provisions of paragraph 4 of section 15 of the Interstate Commerce Act.

The publication of said restrictive schedules did not close any route or channel of trade, or gateway for interchange of traffic which had theretofore been open, nor in any way change any condition, with reference to the movement or handling of traffic via the line of the Clinchfield Railroad, in existence at the time of the lease authorized in the Clinchfield Lease Case. The publication of said restrictive [fol. 13] schedules was evidence of the unwillingness of plaintiffs to become parties to new through route made physically possible for the first time by the opening to traffic of the Greenwood extension of the Georgia and Florida Railroad Company.

XI

Upon the publication of said restrictive schedules prior to the completion of construction of the said Greenwood extension and under date of April 19, 1929, the Georgia

and Florida Railroad Company, a corporation created, organized and existing under the laws of the States of Georgia and of South Carolina, with its residence and principal office at Augusta, Ga., and Piedmont and Northern Railway Company, a corporation created, organized and existing under the laws of South Carolina, with its residence and principal office at Greenville, S. C., within the Western District of South Carolina, filed protests with the Interstate Commerce Commission against said schedules and requested that such restrictive schedules be suspended. Thereupon the Interstate Commerce Commission, purporting to act under the provisions of paragraph 7 of section 15 of the Interstate Commerce Act, suspended said schedules.

The propriety of said restrictive schedules was made the subject of a hearing before the Interstate Commerce Commission and said proceedings were docketed as Investigation and Suspension Docket No. 3290, herein sometimes referred to as I. & S. Docket 3290. Atlantic Coast Line Railroad Company, Louisville and Nashville Railroad Company, Clinchfield Railroad Company, Georgia Railroad and Charleston & Western Carolina Railway Company, together with numerous other railroads, parties to tariffs con-
[fol. 14] taining such restrictive schedules, were made respondents therein.

At the hearing evidence was introduced, including evidence introduced by Atlantic Coast Line Railroad Company, one of the respondents therein, showing the relationship existing between the railroad comprising Atlantic Coast Line system to be as herein set out; showing the circumstances leading up to the adoption of the conditions in the Clinchfield Lease Case, as herein set out, and showing the effect on the lines of railroad comprising said Atlantic Coast Line system of the suspension of said restrictive schedules. After hearing, the Interstate Commerce Commission, under date of June 9th, 1930, made public its report and order in said I. & S. Docket 3290, attached hereto as Exhibit No. 1. In said report the said Interstate Commerce Commission found that:

"From the testimony of the traffic officers of the Clinchfield, Georgia and Charleston it definitely appears that, with respect to the movement of traffic under joint rates

over these three carriers, their traffic policies are under the actual management and control of the Coast Line irrespective of whether the traffic, or any of it, is moved over the Coast Line as a separately operated carrier. The control is actual to the extent of controlling traffic policy. Blackshear Mfg. Co. v. A. C. L. R. R. Co., 87 I. C. C. 654, 664. It also appears that operations of the several parts of the Coast Line system, including the Clinchfield, Charleston, and Georgia, are coordinated for movement of traffic under the joint rates here considered.

"The Georgia and the Clinchfield will not be shorthauled under the provisions of section 15 (4), regardless of whether the proposed restrictions may or may not become effective, [fol. 15] but the Charleston, as an intermediate carrier between the Georgia and the Clinchfield, will be short hauled if the restrictions are found not justified as to joint rates applicable from to or over the Clinchfield. As to traffic moving under joint rates between the Georgia and its connections on the one hand, and the Seaboard and its connections on the other, either over the Charleston or the Greenwood extension, as intermediate lines, the conditions in the Clinchfield lease do not apply. To the extent that traffic may move over the Greenwood extension and the Piedmont to Spartanburg thence over the Clinchfield, the Charleston will be short hauled if the proposed restrictions are required to be canceled."

The Commission, however, also found that the proposed restrictions would be in violation of Conditions 3 and 4 imposed by it in the Clinchfield Lease Case, 90 I. C. C. 113 and in said order required that respondents cancel said schedules. By appropriate orders the effective date of said requirement is postponed to March 15, 1931.

XII

Plaintiffs allege that the effect of the said order of the Commission of June 9, 1930, is intended to and does require Atlantic Coast Line Railroad Company to become a party to new through routes via said Greenwood extension of the Georgia and Florida Railroad which routes embrace substantially less than the entire length of its railroad and of intermediate railroads operated in conjunction and

under common management or control therewith, contrary to the provisions of paragraph 4 of section 15 of the Interstate Commerce Act and such order is therefore void.

XIII

Plaintiffs aver that by accepting the conditions of the [fol. 16] Clinchfield Lease Case the lessees did not intend to consent and did not consent to waive in any degree or to any extent the protection afforded to all carriers by paragraph 4 of section 15 of the Act.

XIV

Plaintiffs allege that the finding of the Interstate Commerce Commission that said restrictive schedules are or would be a violation of any condition in the Clinchfield Lease Case, and particularly of Conditions 3 and / or 4 therein, is contrary to the language and meaning of said conditions. Should plaintiffs, however, fail or refuse to obey said order, if same remains in force, they, and each of them, will be subject to heavy penalties as provided by law. Paragraph 8 of section 15 of the Interstate Commerce Act provides a penalty of $5,000 for any failure to obey an order of the Commission such as is here involved and provides that in case of a continuing violation each day shall be deemed a separate offense.

XV

Plaintiffs further allege that the effect of said order, unless enjoined, will be continuously and unlawfully to deprive plaintiffs of the long haul over their railroads, to which, under the terms of the Interstate Commerce Act, they are entitled, and for which no legal redress is or can be afforded, and to deprive them of the revenues resulting from such haul, and that the said order of the Commission, unless enjoined, will result in continuing and irreparable damage to the plaintiffs and to each of them and will deprive them, and each of them, of their property without due process of law, and deny to them the equal protection of the law in violation of the Constitution of the United

[fol. 17] States and particularly the fifth and fourteenth Amendments thereof.

Wherefore, in consideration of the premises, and forasmuch as Plaintiffs are without remedy at law, and their only protection must arise from the equitable jurisdiction of this Court, Plaintiffs, and each of them, pray:

1. That a writ of subpœna ad respondendum issue out of and under the seal of this Court and be directed to the said defendant, The United States of America, requiring and commanding said defendant on a day certain therein to be specified to be and appear before this Court and to answer this bill, but not under oath, its answer under oath being expressly waived.

2. That this Court direct that due and proper notice of this Bill and proceeding issue and be served forthwith, as prescribed in the said Act of October 22, 1913, (28 U. S. C., Sections 41 (28) and 43 to 48, inclusive.)

3. That a Court constituted as required by said Act of October 22, 1913 (28 U. S. C., Section 48,) be immediately convened and that said Court, upon proper notice grant plaintiffs' application here and now applied for, for an interlocutory injunction setting aside, suspending and restraining the enforcement, operation and execution in whole, of said order Exhibit 1 to this bill, until final decision upon said application.

4. That upon final hearing, this Court, constituted and convened as aforesaid, enter a final decree herein perpetually and forever enjoining the enforcement, operation and execution, in whole, of said order Exhibit 1 to this Bill aforesaid; said decree to adjudicate, hold, order and declare that said order of the Interstate Commerce Commission of June 9, 1930, is without warrant of law, is beyond [fol. 18] the lawful authority of the said Commission, is null and void and that it be set aside and forever annulled.

5. That Plaintiffs and each of them have and recover of the defendant the proper costs of the suit.

6. That Plaintiffs herein and each of them have such other, further, and general relief as may be equitable.

This is the first application for an injunction in this cause.

Atlantic Coast Line Railroad Company by F. B. Grier, Vice-President. Louisville & Nashville Railroad Company by E. S. Jouett, Vice-President. Charleston & Western Carolina Railway Company by F. B. Grier, President.

[fol. 19] *Duly sworn to by C. M. D. Davis. Jurat omitted in printing.*

[fol. 20] EXHIBIT No. 1 TO BILL OF COMPLAINT

15736

INTERSTATE COMMERCE COMMISSION

Investigation and Suspension Docket No. 3290[1]

Restriction in Routing in Connection with THE GEORGIA & FLORIDA RAILROAD Between Greenwood, S. C., and Augusta, Ga.

Submitted March 31, 1930. Decided June 9, 1930

Proposed elimination of the Greenwood extension of the Georgia & Florida Railroad as an intermediate participating carrier in joint rates over the Clinchfield Railroad, Georgia Railroad, and the Atlantic Coast Line Railroad found not justified. Suspension schedules ordered canceled and proceedings discontinued.

Frank W. Gwathmey, F. B. Grier, Carl H. Davis, and T. J. McLaughlin for respondents.

William G. McAdoo, Brice Claggett, Moultrie Hitt, Clarence A. Miller, J. W. Willingham, and Benj. J. Brooks for Georgia & Florida Railroad and its receivers; and W. S. O'B. Robinson, jr., for Piedmont & Northern Railway Company, protestants.

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[1] This report also embraces Investigation and Suspension Docket No. 3332, Same, 165 I. C. C.

Report of the Commission

By the COMMISSION:

This case was made the subject of a proposed report. Exceptions were filed by protestants to the report proposed by the examiner, and oral argument was had. Our conclusions differ from those recommended by the examiner.

In No. 3290, by 337 schedules filed to become effective on May 20, 1929, and later dates, respondents proposed to restrict the application of joint rates so as not to apply over the so-called Greenwood extension of the Georgia & Florida Railroad between Augusta, Ga., and Greenwood, S. C. In No. 3332, similar schedules were filed after the hearings had been concluded in No. 3290, to become effective August 17, 1929, and later dates. Upon protests filed by the Georgia & Florida and the Piedmont & Northern, hereinafter called the Piedmont, operation of the schedules was suspended until December 15, 1929, and later dates. Respondents have voluntarily postponed the effectiveness of the proposed schedules until August 4, 1930.

Respondents and protestants agree that the issues in these two cases are the same, and that they should be considered as one proceeding and determined upon the record made in No. 3290. Except as hereinafter noted, the suspended schedules are published in supplements to tariffs [fol. 21] which contain joint through rates applying over the Greenwood extension of the Georgia & Florida and its connections, and/or over the Piedmont as an intermediate line between Greenwood and Spartanburg, S. C. The intended effect of the proposed restrictions is to close the routes over the Greenwood extension and/or the Piedmont as to joint through rates and thereby make applicable higher combination rates.

Many of the suspended schedules contain a notice reading as follows:

> The extension of the Georgia & Florida R. R. from Augusta, Ga., to Greenwood, S. C., having been opened for handling of traffic, the rates published in this tariff, or as same may be amended, are also applicable via this line, except where otherwise specifically provided.

Prior to the hearings herein, respondents petitioned us to vacate our orders of suspension in No. 3290 upon the following grounds:

1. That the orders suspending the restrictive routing notes had the effect, in and of themselves, of causing the establishment of new and additional through routes and joint rates although a full hearing had not been held as required by section 15 (3) of the interstate commerce act.

2. That the suspension orders were issued in contravention of section 15 (7) of the act, in that the restrictive routing notes do not state any new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, within the meaning of section 15 (7) of the act.

An examination of the suspended schedules disclosed that the Georgia & Florida was named in 33 of them for the first time, and that it was not a party to the original tariffs to which the 33 supplements relate. Therefore, these 33 schedules do not relate to any regulation or practice affecting any existing rate, fare, or charge, applicable on traffic to, from, or over the Georgia & Florida, within the meaning of section 15 (7), as do the other 304 schedules. We were without jurisdiction to suspend operation of the 33 schedules, but we had authority to suspend operation of the other 304 schedules, the intended purpose of which was to restrict the joint rates that would automatically become applicable over the Greenwood extension contemporaneously with the opening thereof on June 1, 1929. Accordingly on July 15, 1929, we entered an order vacating our order of suspension of May 31, 1929, in so far as it related to the 33 schedules, and denying respondents' petition to vacate our orders respecting the other schedules. No evidence in justification of the 33 schedules was received at the hearing. Respondents' petition for preliminary argument and decision upon jurisdictional and other preliminary questions was denied by our order of October 14, 1929, without prejudice upon submission of the case.

[fol. 22] The restrictive notes in the suspended schedules published for account of the Atlantic Coast Line, the Charleston & Western Carolina, and the Columbia, New-

berry & Laurens, hereinafter referred to as the Coast Line, Charleston, and Columbia, respectively, reads substantially as follows:

The rates to, from, or via the line of the Georgia & Florida Railroad between Augusta and Greenwood apply in connection with the Coast Line, Charleston, and Columbia railroads only on traffic interchanged between Coast Line, or Charleston, and Georgia & Florida at Augusta or between the Charleston and Georgia & Florida at Greenwood to or from points on Georgia & Florida between Augusta and Greenwood, not including Augusta or Greenwood.

The restrictive notes in the suspended schedules published for account of the Georgia Railroad & Banking Company, operated as Georgia Railroad, the Atlanta & West Point, and the Western Railway of Alabama, hereinafter collectively referred to as the Georgia, except as otherwise noted; those for account of the Carolina, Clinchfield & Ohio, the Carolina, Clinchfield & Ohio of South Carolina, and the Clinchfield Northern Railway of Kentucky, hereinafter collectively referred to as the Clinchfield; and those for account of all of the respondents herein, published by other carriers and various agents, contain in similar form the restrictive note set out above.

The carriers primarily affected by the proposed restrictions are the Georgia & Florida, Piedmont, and Charleston. Prior to the opening of the Greenwood extension on June 1, 1929, the Georgia & Florida did not extend north of Augusta. Since the completion of the extension its line extends from Greenwood in a southerly direction, through Augusta, to Madison, Fla., 309 miles. The Georgia & Florida, including its several branches, operates 464 miles of railroad, most of which is in Georgia, where it competes with the Southern, the Seaboard Air Line, and the Atlantic Coast Line and affiliated lines of the latter. The Greenwood extension, 59 miles in length, was constructed after our approval in Reorganization of Georgia & Florida Ry., 117 I. C. C. 473, decided December 23, 1926, hereinafter called the Reorganization case. At that time the Georgia & Florida was in receivership but it was later reorganized and the receiver discharged. Since the hearings in the instant proceeding were concluded it has again been placed in the hands of receivers and is now being so op-

erated. At Greenwood, the extension connects with the Seaboard and the Charleston, and also with the Piedmont, an electrically operated railroad extending in a northerly direction from Greenwood to Spartanburg, 89 miles, closely paralleling the line of the Southern between the same points. At Spartanburg the Piedmont and the Charleston connect with the Clinchfield, over the tracks of the South- [fol. 23] ern. Large expenditures for additions and betterments to the Charleston have been made since Federal control for the purpose of putting it in condition to move through traffic received by it from other lines of the Coast Line system, and lands have been purchased by the Piedmont with a view to building a tunnel under the Southern at Spartanburg to effect a direct connection of both the Charleston and the Piedmont with the Clinchfield, if and when authorized by us.

The Charleston has a line extending north from Augusta through Greenwood to Spartanburg, 133 miles, or 15 miles less than the combined lengths of the Greenwood extension from Augusta to Greenwood and the Piedmont from Greenwood to Spartanburg. The distance from Augusta to Greenwood over the Charleston is 67 miles, as compared with 59 miles over the Greenwood extension. The Charleston has a line extending southeast from Augusta through Yemassee, S. C., at which point it connects with the main line of the Coast Line extending from Richmond, Va., to Jacksonville, Fla. The distances over these intermediate routes present no question of undue circuity.

The Clinchfield's main line extends south from Elkhorn City, Ky., where it connects with the Chesapeake & Ohio, to Spartanburg, about 277 miles. It has other eastern and western connections between its main-line termini. Proposed connections between the Clinchfield and the Louisville & Nashville, hereinafter called L. & N., are described in Clinchfield Railway Lease, 90 I. C. C. 113, hereinafter referred to as the Clinchfield Lease case. In Construction and Operation by L. & N. R. R., 124 I. C. C. 581, the L. & N. was authorized to construct a new line from Chevrolet, Ky., to a point of connection with the Interstate Railroad near Hagans, Va., and to acquire trackage rights over the Interstate Railroad therefrom to a point of connection with the Clinchfield at Miller Yard, Va. The construction

work, now in progress, is required to be completed on or before June 30, 1930.

The lines of the Georgia extend southwestward from Augusta through Atlanta, Ga., to Montgomery, Ala., where they connect with the L. & N. and the Coast Line. The latter carrier has lines extending from Norfolk and Richmond, Va., through Virginia, the Carolinas, Georgia, Alabama, and throughout practically the entire State of Florida. It connects with the Charleston and the Georgia & Florida at Augusta.

The L. & N. has a main line extending from Cincinnati, Ohio, through Louisville, Ky., Nashville, Tenn., Birmingham, Montgomery, and Mobile, Ala., to New Orleans, La., and another main line extending from Cincinnati to Atlanta. It also has lines from Louisville, and other points on its Cincinnati-New Orleans main line, extending to St. [fol. 24] Louis, Mo., and Memphis, Tenn. These lines and their connections serve a large area in southern, southwestern, central, and trunkline territories. It has many branch lines in Kentucky, Tennessee, Alabama and Florida.

The Nashville, Chattanooga & St. Louis has a main line extending from Atlanta through Chattanooga and Nashville to Memphis, together with branch lines extending from Bruceton, Tenn., to Hickman and Paducah, Ky., and others to central Tennessee and northeastern Alabama points.

The Columbia extends from Laurens, S. C., a point of connection with the Charleston, southeast to Columbia, S. C., where it connects with the main line of the Coast Line.

In the Clinchfield Lease case we found the leasing of the Clinchfield by the Coast Line and the L. & N. for 999 years to be in the public interest as contemplated by section 5 (2) of the act, and approved the lease, subject to five conditions which are recited in our report in that case, all of which were accepted by the lessees notwithstanding that conditions 3 and 4 were vigorously protested by them. Conditions 1, 3, and 4 are pertinent to the issues in the instant case and are as follows:

1. The applicants shall establish and maintain a separate organization for the combined properties of the Carolina, Clinchfield & Ohio Railway and its subsidiaries, so that the three companies shall constitute a separate operating unit,

having a responsible management directly in charge of the operations of such properties.

3. So far as lies within the power of the appellants, existing routes and channels of trade and commerce heretofore established by other carriers in connection with the Clinchfield shall be preserved, existing gateways for the interchange of traffic with such other carriers shall be maintained, and the present neutrality of handling traffic inbound and outbound by the Carolina, Clinchfield & Ohio Railway and its subsidiary, the Carolina, Clinchfield & Ohio Railway of South Carolina, shall be continued so as to permit equal opportunity for service and routing or movement of traffic which is competitive with traffic of the applicants, or either of them, to and from all connecting lines reached by the line of the Clinchfield companies, without discrimination in service against such competitive traffic.

4. The applicants shall permit the line of the Clinchfield and its subsidiaries to be used as a link for through traffic, via existing gateways of interchange, or via such gateways as may hereafter be established under authority of the Commission by means of the connecting lines which the Louisville & Nashville Railroad Company proposes to build, equally available to such other carriers, now connecting, or which may hereafter connect, with the line of the Clinchfield and its subsidiaries, as may desire to participate in through routes and joint rates between points in territory north and west of the line of the Clinchfield and points at and beyond the Ohio River on the one hand and points in southeastern and Carolina territory on the other, under divisions to be agreed upon by the applicants, or either of them, and/or the Clinchfield organization, on the one hand, and by the other participating carrier or car-
[fol. 25] riers on the other, and shall not discriminate as to rates, fares, and charges against such participating carrier or carriers as compared with the applicants, or either of them; the intention of this provision being that the line of the Clinchfield and its subsidiaries shall be maintained as an open route equally available to all carriers connecting with the Clinchfield for traffic between the points designated.

These conditions were imposed in consideration of representations made by the Piedmont, Georgia & Florida, and

Seaboard, that if routes over the Clinchfield should be closed to them they would be deprived of traffic moving under joint rates which might otherwise move over their lines or future extensions thereof, and that existing and potentially competitive routes would thereby be destroyed. The Georgia & Florida also opposed the unconditional leasing of the Clinchfield because of its then announced intention of seeking our approval to extend its line from Augusta to Greenwood so as to obtain a connection with the Clinchfield at Spartanburg through the medium of the Piedmont, and expressed apprehension that if the Coast Line should be permitted to unconditionally lease the Clinchfield, the Greenwood extension, when constructed, would be discriminated against in favor of the Charleston by means of restrictions of joint rates. Except for the proposed restriction in joint rates over the Greenwood extension, routes over the Piedmont, Georgia & Florida, and Seaboard have remained open since the Clinchfield was leased, and there are no proposals by respondents to close them.

The restrictions considered, generally speaking, apply to the following two classes of traffic: (1) Traffic between points in territory north and west of the line of the Clinchfield and points at and beyond the Ohio River, on the one hand, and points in southeastern and Carolina territory, on the other hand; and (2) traffic between points on the Georgia and its connections, on the one hand, and points in the Carolinas and in the territory north and west thereof, on the other. It is traffic from and to territories described in condition 4 of the Clinchfield lease that is the principal bone of contention here. If the routes over the Greenwood extension are kept open, protestants expect to obtain a large amount of traffic for movement thereover under the existing joint rates between points on the Georgia & Florida and the Seaboard and their connections, on the one hand, and points in central territory, including Springfield, Toledo, and Cleveland, Ohio, Detroit, Mich., Pittsburgh, Pa., and Buffalo, N. Y., on the other, in connection with which the Clinchfield, as an intermediate carrier, forms a part of the shortest routes.

Protestants contend that the questions to be determined in these proceedings are as follows:

[fol. 26] 1. Does the publication of the restrictive routing notes constitute violations of conditions 1, 3, and 4 of the Clinchfield lease?

2. Are the Coast Line, the Clinchfield, the L. & N., the Charleston, the Georgia, and the Columbia operated under a common management or control, within the meaning of section 15 (4)?

3. Does the imposition of the routing restrictions create unjust discrimination in violation of section 3 (3)?

4. Does the imposition of the routing restrictions short-haul the Georgia & Florida in violation of section 15 (4)?

The principal issue is whether the routes over the Piedmont and the Greenwood extension shall be closed so as to prevent the short-hauling of the Charleston.

The pertinent provisions of paragraphs 3 and 4 of section 15 are as follows:

(3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications and joint rates, fares, or charges, applicable to the transportation of passengers or property, or the maxima or minima, or maxima and minima, to be charged (or, in the case of a through route where one [redacted] the carriers is a water line, the maximum rates, fares, [redacted] charges applicable thereto), and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated; and this provision, except as herein otherwise provided, shall apply when one of the carriers is a water line. * * *

(4) In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line), require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with an-

other practicable through route which could otherwise be established.

We are not called upon in this proceeding to require the establishment of through routes, joint rates, and divisions, as might have been required if through routes and joint rates had not been contemporaneously established with the opening of the Greenwood extension. Our powers are limited by section 15 (4) in a case where carriers seek to close existing through routes and make joint rates thereover inapplicable to the same extent as in a case where we are authorized initially to establish through routes and joint rates. This proceeding is brought under section 15 (7), under which we must determine whether the proposed restrictions, having for their purpose the closing of existing routes, and of making joint rates inapplicable thereover, are justified.

[fol. 27] In the Reorganization case, we found it to be in the public interest to approve and authorize the building of the Greenwood extension, but we did not then consider what specific through routes and joint rates thereover should be applicable. We did, however, take judicial notice of our findings in the Clinchfield Lease case, and at page 475 we said in respect of the Greenwood extension:

As an aid in securing better connections for the interchange of traffic it has been planned to extend the line from Augusta in a northerly direction to Greenwood, S. C., a distance of about 56 miles. By this extension connection would be effected with the Seaboard Air Line and the Piedmont & Northern, the latter a strong independent electric line. Through these connections the Georgia & Florida will have direct access to the very important traffic-producing territory of northern South Carolina and central North Carolina, known as the Piedmont district. Through the medium of the Piedmont & Northern, it will also have an advantageous connection with the Clinchfield Railroad at Spartanburg, S. C., and through this connection it expects to realize a substantial participation in the tonnage of coal and other commodities moving southbound over the Clinchfield destined to southern Georgia and Florida, and the northbound movement of freight, principally citrus fruits and vegetables, from southern territory. The lines of the Southern Railway and the Charleston & Western Carolina,

the latter a part of the Atlantic Coast Line System, also extend between Greenwood and Spartanburg, connecting with the Clinchfield, but as both of these lines have their own connections to the south the Georgia & Florida must look principally to the Piedmont & Northern for its interchange with the Clinchfield.

There are commodities other than those referred to above, such as brick, lumber, sand, and gravel, moving over the Clinchfield which may be carried over the route of the Piedmont and the Greenwood extension or the Charleston if both routes are made equally available to shippers under the same rates.

The Coast Line did not respond to the notice of the application for authority to construct the Greenwood extension, nor did it interpose any objection thereto. Neither did it, nor any of its subsidiaries or controlled lines, appear at the hearings in connection therewith.

The evidence relating to the question of whether the so-called Coast Line system, including the Clinchfield and the Georgia, are operated in conjunction and under a common management or control is substantially stated, as follows: The Coast Line owns 596,700 shares of the capital stock of the L. & N., or about 51 per cent of the stock issued and outstanding. The Coast Line controls the L. & N. by electing the board of directors of the latter, who in turn elect the president and other officers. These officers are charged with the operation of the property subject to the general direction of the board. The Coast Line and the L. & N. have the same person serving as chairman of their boards of directors, but they maintain separate organizations to operate the respective properties. They have close working [fol. 28] arrangements with each other in the movement of traffic and in the matter of train service.

Subject to the conditions in the Clinchfield Lease case, which were accepted by the Coast Line and the L. & N., the Clinchfield is under the control of the lessees by means of an executive board, and a general manager appointed by the board, as provided for in the lease. At present this board consists of the chairmen of the board of directors of each of the lessees, an executive vice-president of the L. & N., and the president of the Coast Line. The general manager in charge of operations of the Clinchfield was

directed by the officials of the Coast Line to publish the proposed restrictions in behalf of the Clinchfield.

The Charleston, which is the intermediate carrier between the Clinchfield, the Georgia, and the Coast Line, is operated by its own officers, who are, generally speaking, also officers of the Coast Line. The only executive officer of the Charleston who is not also an officer of the Coast Line is the president and general manager, who was formerly general superintendent of the Coast Line. The vice president in charge of traffic for the Coast Line is also traffic manager for the Charleston. For many years the Charleston has been operated in accord with the policies of the Coast Line. Excepting qualifying shares for the directors, all of the capital stock of the Charleston is owned by the Atlantic Coast Line Company of Connecticut, which also owns about 28 per cent of the capital stock of the Atlantic Coast Line Railroad Company, a Virginia corporation, but substantially the same individuals own the capital stock of the Connecticut and Virginia corporations. In Routing Via Hampton & B. R., 148 I. C. C. 547, division 3 said:

> The Coast Line and the C. & W. C. are closely affiliated but they are not "operated in conjunction and under a common management or control," as specified in section 15 (4) of the interstate commerce act. From the standpoint of short hauling it is therefore proper to consider them as separate carriers.

The justification for restriction of the joint rates in that case turned on the point that the Coast Line and the Charleston would be substantially short hauled, and that the Hampton & Branchville would have reasonable routes open to shippers on its line at rates no higher than the joint rates. It was therein found, in effect, that the continued participation of the Hampton & Branchville as an intermediate carrier in joint rates over the Charleston and the Coast Line would involve the short hauling of the latter carriers.

The Georgia Railroad is leased from the Georgia Railroad & Banking Company jointly by the Coast Line and the L. & N. The property is operated as a part of the [fol. 29] Coast Line-L. & N. system. For convenience of operation a separate organization is maintained by the

lessees. The president of the L. & N. and the chairman of the board of directors of the Coast Line are authorized by the two companies to operate the Georgia. This they do by appointing a general manager with authority to maintain an organization for the purpose. It makes separate reports to us, but its profits are included in the tax returns of the lessees, who share any losses from the operation of the property and furnish any money needed for additions and betterments in excess of the earnings.

The Atlanta & West Point, called the West Point, is operated by its own organization, which is elected or appointed by the board of directors. The general manager of the Georgia is elected president of the West Point by the L. & N. and Coast Line boards of directors. The L. & N. and Coast Line own 50.6 per cent of the stock of the West Point. The Coast Line owns 50 per cent of the stock of the Western Railway of Alabama. The latter carrier is operated by the same officers that operate the West Point. Both are operated in conjunction with the Coast Line. The L. & N. has control of the Nashville, Chattanooga & St. Louis by stock ownership, but the latter is operated by a separate staff of officers.

There is no evidence concerning the common management or control of the Columbia, but it is commonly understood to be a part of the Coast Line system. This carrier joined the Coast Line in publishing the restrictive notes here under suspension. In Control of Columbia, Newberry & Laurens R. R., 117 I. C. C. 219, we stated:

> While the properties of the carrier are operated under separate management, certain officers and directors of the applicant also serve the carrier in various capacities in accordance with authorizations obtained from us under paragraph (12) of Section 20a of the act. While these common officers direct the policies of the carrier as to traffic and physical improvements, operation of the line is conducted on a neutral basis.

From the testimony of the traffic officers of the Clinchfield, Georgia, and Charleston it definitely appears that, with respect to the movement of traffic under joint rates over these three carriers, their traffic policies are under the actual management and control of the Coast Line irrespective of whether the traffic, or any of it, is moved over the

Coast Line as a separately operated carrier. The control is actual to the extent of controlling traffic policy. Blackshear Mfg. Co. v. A. C. L. R. R. Co., 87 I. C. C. 654, 664. It also appears that operations of the several parts of the Coast Line system, including the Clinchfield, Charleston, and Georgia, are coordinated for movement of traffic under the joint rates here considered.

[fol. 30] The Georgia and the Clinchfield will not be short hauled under the provisions of section 15 (4), regardless of whether the proposed restrictions may or may not become effective, but the Charleston, as an intermediate carrier between the Georgia and the Clinchfield, will be short hauled if the restrictions are found not justified as to joint rates applicable from, to, or over the Clinchfield. As to traffic moving under joint rates between the Georgia and its connections on the one hand, and the Seaboard and its connections on the other, either over the Charleston or the Greenwood extension, as intermediate lines, the conditions in the Clinchfield lease do not apply. To the extent that traffic may move over the Greenwood extension and the Piedmont to Spartanburg thence over the Clinchfield, the Charleston will be short hauled if the proposed restrictions are required to be canceled.

By stipulation, certain parts of the record in the Clinchfield Lease case, were made a part of the record in the instant proceedings. Those parts concerning the conditions in the lease, heretofore quoted, and their interpretation in the light of the contentions of parties and our ad interim suggestions, are presented for our consideration here on the question of whether the conditions apply to a newly constructed line having as its only connection with the Clinchfield the intermediate line of the Piedmont, an independently operated carrier not in any way operated in conjunction with the newly constructed extension through a common management or control.

Stated generally, it is the position of protestants that in the Clinchfield Lease case we gave consideration to the announced purpose of the Georgia & Florida to construct the Greenwood extension as part of a through route for the movement of traffic over the Piedmont, and that we had that purpose in mind in authorizing the construction of the extension. They state that the Georgia & Florida, relying on these proceedings and on condition 4 of the

lease, expended about $3,300,000 in building the Greenwood extension so as to obtain through traffic moving over the Clinchfield and the Piedmont. They also argue that the Coast Line can not restrict through routes which were in existence at the time of the lease so as to discriminate in favor of the Charleston. In short, their contention is that under the conditions of the lease the Clinchfield is required to be maintained as an open route between the points to serve which the Greenwood extension was constructed. They further contend that condition 1, requiring independent management of the Clinchfield, has been violated by the proposed restrictions, referring to certain evidence in the Clinchfield Lease case to the effect that the Clinchfield would be operated, from a traffic standpoint, [fol. 31] primarily in the interest of that line, and that it would be operated free from the dominance of the Coast Line and the L. & N. Further, that the restriction of the joint rates as proposed would force the Georgia & Florida to short haul itself, because it would be forced to relinquish or receive traffic at Augusta for movement over the Charleston and Clinchfield, thus depriving it of an additional haul from its Greenwood extension for movement over the Piedmont between Greenwood and Spartanburg.

Protestants also contend that the continuance of unrestricted through routes and joint rates over the Greenwood extension to and from points on the Georgia & Florida in connection with the Georgia, and in connection with the Piedmont and the Clinchfield, is necessary and desirable in the public interest; that the proposed restrictions of the Georgia will result in undue discrimination against the Georgia & Florida and the Piedmont, in favor of other carriers connecting with the Georgia at Augusta; and that to single out the Charleston for participation in traffic under joint rates from points on the Georgia and its important connections to Greenwood and Spartanburg, and to refuse participation by the Georgia & Florida in the same joint rates is a discrimination in rates between connecting lines in violation of section 3 (3) of the act. The latter claim is predicated on the general contention that the Georgia, Charleston, and the Coast Line are not operated in conjunction and under common management or control, and the fact that on some commodities single-line rates have not been established for these separate com-

panies, as well as on protestants' position that the conditions of the Clinchfield lease will be violated by the proposed restrictions.

It is the general contention of the respondents that the Coast Line, Charleston, Georgia, and Clinchfield are "operated in conjunction and under a common management or control" within the meaning of section 15 (4), and are therefore entitled to the protection of that provision in retaining the long haul; that the conditions of the Clinchfield lease relate only to gateways and to directly connecting lines in existence at the time the conditions were imposed; and that there is no warrant for extending the benefit of the conditions to new lines not affiliated with direct connections of the Clinchfield and reached through gateways which were not then in existence. They further contend that if it be conceded that the joint rates which they propose to restrict are made applicable over the Greenwood extension, there must be some limitation on their application over newly constructed lines to junctions not theretofore reached by the Clinchfield; otherwise, there would be no limit to the possibility of short hauling carriers connecting with the Clinchfield.

[fol. 32] The respondents construe the conditions of the Clinchfield lease too narrowly. In authorizing that lease we said in reference to the Georgia & Florida and other opponents of the application—

> Those opposing the lease urge that the interest of each of the interveners and of the public in general will be best served if the Clinchfield is maintained as an independent line supported by its connections at each end. They request that any approval of the proposed acquisition be under condition that the Clinchfield be maintained as an open route, neutral or impartial, and equally available to all connections. They generally urge that unconditional approval of the application be refused.

The conditions imposed, and accepted by the Coast Line and the L. & N., were intended to provide in substance for the advantages thus requested, and fairly construed should have that effect. Their purpose was to preserve the relationships then existing between the Clinchfield, on the one hand, and the public and connecting lines of railroad, on the other hand, which were the relationships usually

and normally existing between independent railroads and those whom it serves. This purpose is clearly indicated by the language, particularly the closing portion of condition 3, reading:

> The present neutrality of handling traffic inbound and outbound by the Carolina, Clinchfield & Ohio Railway and its subsidiary, the Carolina, Clinchfield & Ohio Railway of South Carolina, shall be continued so as to permit equal opportunity for service and routing or movement of traffic which is competitive with traffic of the applicants, or either of them, to and from all connecting lines reached by the line of the Clinchfield companies, without discrimination in service against such competitive traffic.

And by the corresponding portion of condition 4, reading:

> The intention of this provision being that the line of the Clinchfield and its subsidiaries shall be maintained as an open route equally available to all carriers connecting with the Clinchfield for traffic between the points designated. [The points here referred to are points in territory north of the Ohio and points in southeastern territory.]

While our immediate concern was to prevent the closing of any gateways and routes then existing, there was no thought of excluding such changes or additions as would further the general purpose. The proposed restriction of routing would not preserve the "present neutrality" of the Clinchfield, but on the contrary would seriously impair it. There can be no doubt that, as an independent carrier, the Clinchfield would welcome an additional competing route for the movement of its traffic to and from the territory served by the Georgia & Florida; and it is equally apparent that such a route would benefit the Georgia & Florida and the public it serves.

There is no warrant for limiting the meaning of "connecting lines" to the direct connections of the Clinchfield. The term is commonly used in referring to the lines in general making up a through route. There is in fact no [fol. 33] other convenient term. The technical nature of this contention of respondents becomes apparent when it is considered that under their construction the conditions

would necessarily apply to any extension of operations by the Piedmont, regardless of effect in short hauling the Coast Line. However, the conditions may not be so construed as to authorize or require the opening or maintenance of all other routes of which the Greenwood extension might physically be made a part. The test to be applied is that of the proper relationships between the Clinchfield, as an independent line, and its connections to and from southeastern territory.

The order conditionally approving and authorizing the lease of the Clinchfield contains the provision that "the making of said lease and exercise of any of the rights conferred by this order shall in all future proceedings, judicial as well as administrative, to which the carriers above named or any of them may be parties, be deemed and taken as conclusive evidence of their acceptance of, and agreement to abide by, the conditions enumerated in said report, and numbered from 1 to 5, inclusive."

Having reached the conclusion, which we deem to be controlling, that the proposed restrictions here under consideration would be in violation of the conditions of the Clinchfield lease, it is unnecessary to discuss or decide other questions raised by the protestants. It may be said, however, that the Coast Line is in an apparently inconsistent position in considering the Charleston as a railroad "operated in conjunction and under a common management or control" with the Coast Line within the meaning of section 15 (4), while applying 2-line rates to certain traffic it interchanges with that company.

We find that the suspended schedules have not been justified. An order will be entered requiring their cancellation and discontinuing these proceedings.

PORTER, Commissioner, concurring in part:

I concur in the result, but I base my conclusion that the proposed schedules should be canceled upon the conviction that to restrict joint rates affected by these schedules so that they will not apply over the Greenwood extension while continuing the application of such joint rates over the route of the Southern between Spartanburg and Augusta, or over the route of the Seaboard between Bostic and Greenwood, would work undue discrimination in violation of section 3 (3), which provides that carriers

shall not discriminate in their rates, fares, and charges between connecting lines or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.

[fol. 34] The majority report gives very little consideration to this contention of protestants and dismisses it by the simple statement that "the lines of the Southern between Augusta on the one hand, and Greenwood and Spartanburg on the other, are admitted to be circuitous by the protestants." The line of the Southern between Augusta and Spartanburg is 177 miles long, which is only 44 miles, or about 33 per cent, longer than the line of the Charleston between the same points. If we consider, as we should, the through routes from origin to destination of this traffic, the difference in distance over the two routes is insignificant, and I do not understand that anyone contended or admitted of record that the route of the Southern is unduly circuitous. And this is also true of the route of the Seaboard via Bostic and Greenwood. Even if there were such a contention, the fact is that these routes are open and are not here proposed to be restricted. Under these circumstances for respondents to single out the Georgia & Florida for restrictive treatment without at the same time restricting the routes of the Southern and the Seaboard is clearly unduly discriminatory and in violation of law.

In Ala., Tenn. & Northern R. Corp. v. Southern Ry. Co., 148 I. C. C. 708, division 3 held that the failure and refusal of defendants Southern Railway system to enter with complainant, Alabama, Tennessee & Northern into joint rates via York, Ala., on interstate traffic moving over complainant's line between Mobile, Ala., and all points on defendants' lines while maintaining joint rates on like traffic in connection with the Mobile & Ohio and Gulf, Mobile & Northern via Meridian, Miss., and the Louisville & Nashville via Birmingham, was in violation of section 3 (3) of the act. The facts in the two cases in respect of this paragraph of the law are practically identical. We have applied this provision of the law under somewhat similar circumstances in a number of cases. Ann Arbor R. R. Co. v. B. & O. R. R. Co., 136 I. C. C. 578; Central R. R. Co. of N. J. v. N. Y., N. H. & H. R. R. Co., 122 I. C. C. 661.

The fact that the Southern and the Seaboard are direct connections of the Clinchfield, and certainly fall within the conditions of the Clinchfield lease under which their routes could not be restricted on this traffic, has no important bearing upon the application of the law to the facts in this case. Section 3 (3) was the law at the time respondents accepted those conditions as a part of the Clinchfield lease and every act of theirs in respect of this Clinchfield traffic will have to square with those provisions of law, as well as with the lease conditions. This I am convinced the proposed schedules would not do.

[fol. 35] WOODLOCK, Commissioner, dissenting:

It seems to me that section 15 (4) controls this case. Although the fourth condition of the Clinchfield lease raises some doubt upon the point, I am compelled to resolve that doubt in favor of the section, because of its fundamental importance to the spirit as well as the letter of the transportation act. Protection of a carrier in its long haul is a necessary part of a national system of railroads composed of separately owned, separately operated competitive carriers, if those carriers are to function as Congress expected them to function when it chose such a system and expressed it in law. I do not believe that section 15 (4) should be held by us inapplicable save upon the clearest grounds. No such grounds are here apparent.

[fol. 36] ORDER

AT A GENERAL SESSION OF THE INTERSTATE COMMERCE COMMISSION, HELD AT ITS OFFICE, IN WASHINGTON, D. C., ON THE 9TH DAY OF JUNE, A. D. 1930.

Investigation and Suspension Docket No. 3290

Restriction in Routing in Connection with the Georgia & Florida Railroad Between Greenwood, S. C., and Augusta, Ga.

Investigation and Suspension Docket No. 3332

Restriction in Routing in Connection with the Georgia & Florida Railroad between Greenwood, S. C., and Augusta, Ga.

It appearing, That by orders dated May 14, May 31, June 4, June 8, June 10, June 14, June 19, June 25, and July 15, 1929, in No. 3290, and by orders dated August 14, August 30, September 12, October 29, December 2, 1929, and January 11, January 27, February 13, and April 9, 1930, in No. 3332, the commission entered upon a hearing concerning the lawfulness of the rates, charges, regulations, and practices stated in the schedules enumerated and described in said orders, and suspended the operation of said schedules in No. 3290 until December 15, 1929, and later dates, and in No. 3332 until March 17, 1930, and later dates;

It further appearing, That the operation of said schedules has been voluntarily deferred by respondents until August 4, 1930;

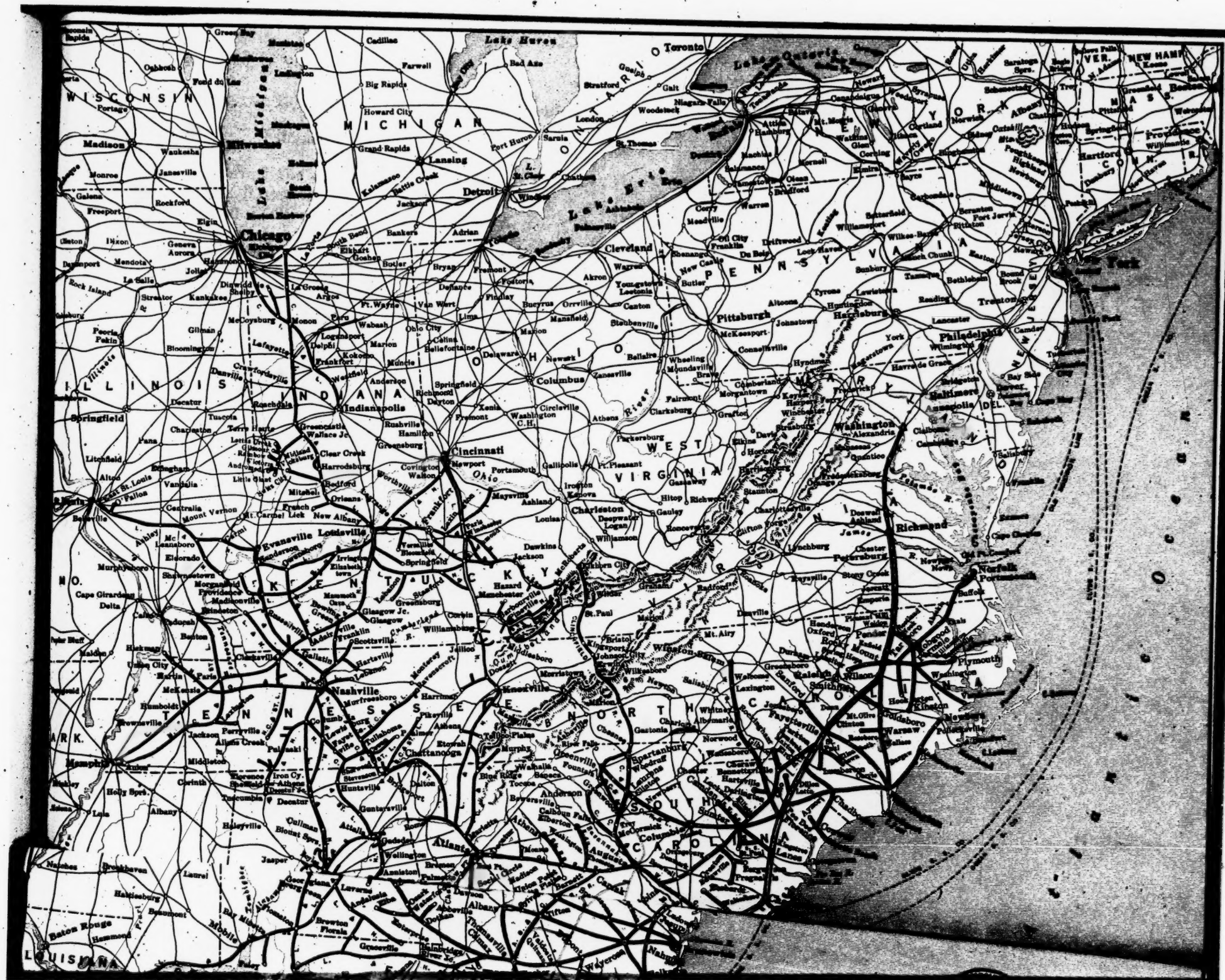
And it further appearing, That a full investigation of the matters and things involved has been had, and that the commission, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

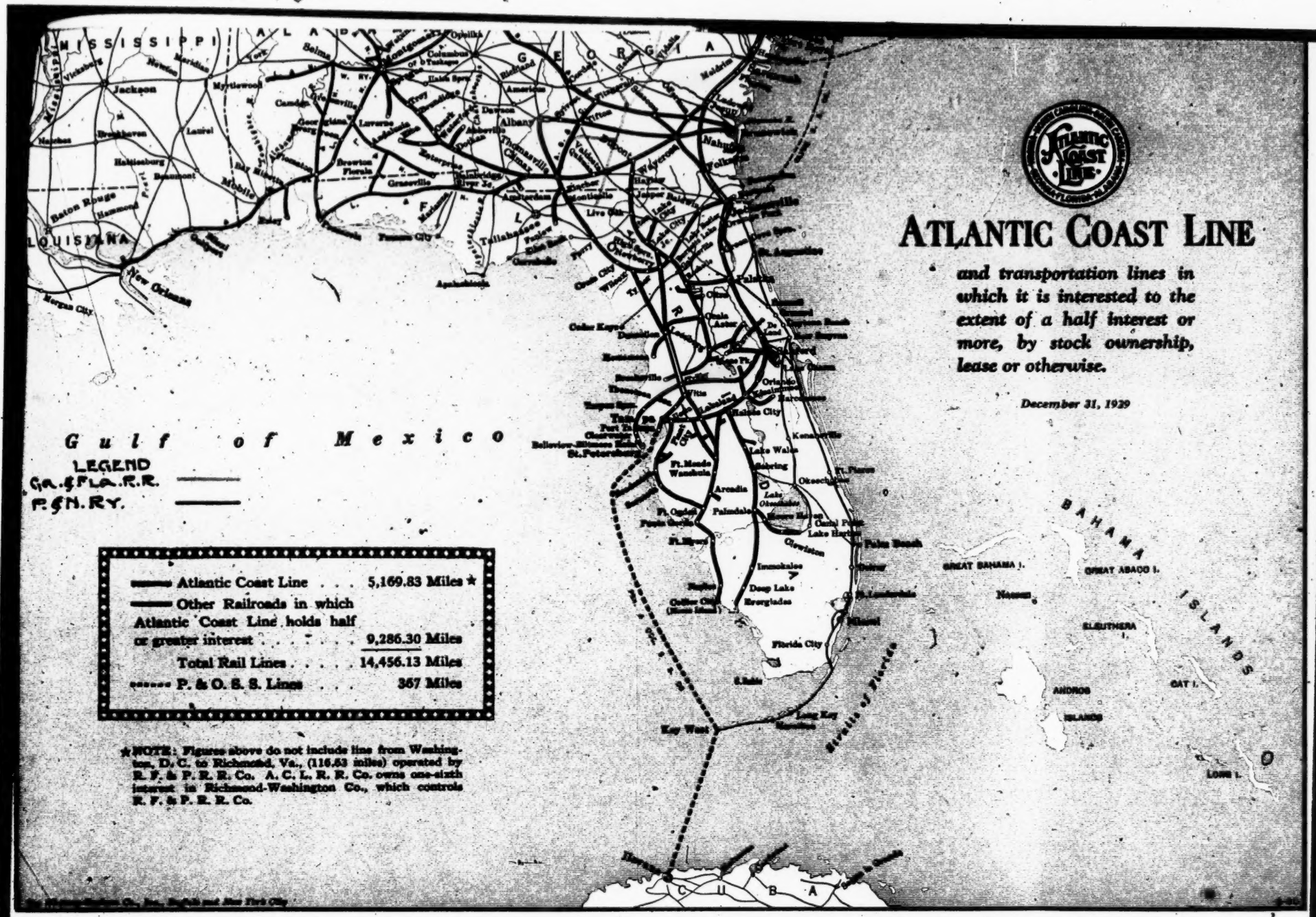
It is ordered, That the respondents herein be, and they are hereby, notified and required to cancel said schedules, on or before August 2, 1930, upon notice to this commission and to the general public by not less than one day's filing and posting in the manner prescribed in section 6 of the interstate commerce act, and that these proceedings be discontinued.

By the Commission.

[SEAL.] George B. McGinty, Secretary.

[fol. 37] EXHIBIT No. 2 TO BILL OF COMPLAINT


WISCONSIN
MICHIGAN
Lake Michigan
Lake Huron
Lake Erie
Lake Ontario
ONTARIO
Toronto
ILLINOIS
INDIANA
OHIO
KENTUCKY
TENNESSEE
WEST VIRGINIA
PENNSYLVANIA
NEW YORK
VIRGINIA
NORTH CAROLINA
SOUTH CAROLINA
MARYLAND
DEL.
Chicago
Detroit
Cleveland
Pittsburgh
Cincinnati
Columbus
Indianapolis
Louisville
Evansville
Washington
Baltimore
Philadelphia
Harrisburg
Richmond
Norfolk
Portsmouth
Charleston
Knoxville
Nashville
Chattanooga
Atlanta
Memphis
Buffalo
Rochester
Syracuse
Albany
New York
Boston
Milwaukee
Madison
Springfield
Peoria
Toledo
Akron
Canton
Youngstown
Wheeling
Parkersburg
Huntington
Lexington
Louisville
Evansville
Terre Haute
Fort Wayne
Lansing
Grand Rapids
Kalamazoo
Battle Creek
Saginaw
Bay City
Flint
Port Huron
Sarnia
London
Hamilton
Niagara Falls
Buffalo
Rochester
Syracuse
Utica
Albany
Troy
Schenectady
Binghamton
Elmira
Corning
Scranton
Wilkes-Barre
Harrisburg
Reading
Lancaster
Trenton
Camden
Wilmington
Philadelphia
Atlantic City
Cape May
Baltimore
Annapolis
Washington
Alexandria
Fredericksburg
Richmond
Petersburg
Norfolk
Portsmouth
Newport News
Williamsburg
Yorktown
Old Point Comfort
Cape Charles
Lynchburg
Roanoke
Bristol
Kingsport
Johnson City
Asheville
Greensboro
Winston-Salem
Raleigh
Wilmington
Charlotte
Spartanburg
Greenville
Columbia
Charleston
Savannah
Augusta
Macon
Columbus
Montgomery
Birmingham
Mobile
New Orleans
Baton Rouge
Vicksburg
Jackson
Meridian
Hattiesburg
Natchez
Memphis
Little Rock
Hot Springs
Texarkana
Shreveport
Monroe
Alexandria
Lake Charles
Beaumont
Houston
Galveston
Corpus Christi
Brownsville
Laredo
San Antonio
Austin
Waco
Dallas
Fort Worth
Abilene
Amarillo
Lubbock
Wichita Falls
Oklahoma City
Tulsa
Muskogee
Fort Smith
Little Rock
Kansas City
St. Louis
Springfield
Joplin
Cape Girardeau
Poplar Bluff
Sikeston
Hannibal
Quincy
Keokuk
Burlington
Davenport
Rock Island
Moline
Peoria
Bloomington
Decatur
Springfield
Alton
East St. Louis
Belleville
Centralia
Mount Vernon
Evansville
Terre Haute
Indianapolis
Richmond
Muncie
Anderson
Kokomo
Lafayette
Logansport
South Bend
Elkhart
Gary
Hammond
Michigan City
La Porte
Benton Harbor
St. Joseph
Kalamazoo
Battle Creek
Jackson
Ann Arbor
Detroit
Flint
Saginaw
Bay City
Grand Rapids
Muskegon
Holland
Milwaukee
Racine
Kenosha
Waukegan
Chicago
Gary
Hammond
Joliet
Aurora
Elgin
Rockford
Freeport
Dubuque
Davenport
Rock Island
Moline
Galesburg
Quincy
Hannibal
St. Joseph
Kansas City
Independence
Sedalia
Jefferson City
Columbia
Springfield
Joplin
Fayetteville
Fort Smith
Little Rock
Pine Bluff


MISSISSIPPI
ALABAMA
GEORGIA
LOUISIANA
Gulf of Mexico
LEGEND
GA. & FLA. R.R.
F. & N. RY.
Atlantic Coast Line . . . 5,169.83 Miles ★
Other Railroads in which Atlantic Coast Line holds half or greater interest . . . . . 9,286.30 Miles
Total Rail Lines . . . . . 14,456.13 Miles
P. & O. S. S. Lines . . . 367 Miles
★NOTE: Figures above do not include line from Washington, D. C. to Richmond, Va., (116.63 miles) operated by R. F. & P. R. R. Co. A. C. L. R. R. Co. owns one-sixth interest in Richmond-Washington Co., which controls R. F. & P. R. R. Co.
ATLANTIC COAST LINE
and transportation lines in which it is interested to the extent of a half interest or more, by stock ownership, lease or otherwise.
December 31, 1929
BAHAMA ISLANDS
GREAT BAHAMA I.
GREAT ABACO I.
Nassau
ELEUTHERA I.
ANDROS ISLANDS
CAT I.
LONG I.
Straits of Florida
Key West
Havana
CUBA

[fol. 38] EXHIBIT No. 3 TO BILL OF COMPLAINT

BEFORE THE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 3131

In the Matter of the Joint Application of the ATLANTIC COAST LINE RAILROAD COMPANY and LOUISVILLE & NASHVILLE RAILROAD COMPANY for Authority to Acquire Control, by Lease, of the Railroad and Properties of the Carolina, Clinchfield & Ohio Railway, the Carolina, Clinchfield & Ohio Railway of South Carolina, and the Clinchfield Northern Railway of Kentucky

Applicants' Reply to Letter of Chairman Hall, Dated February 9, 1924, Suggesting Certain Conditions

George B. Elliott, Edward S. Jouett, Counsel for Applicants.

March 25, 1924.

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[fol. 41] INTERSTATE COMMERCE COMMISSION

Finance Docket No. 3131

In the Matter of the Joint Application of the ATLANTIC COAST LINE RAILROAD COMPANY, and LOUISVILLE & NASHVILLE RAILROAD COMPANY for Authority to Acquire Control, by Lease, of the Railroad and Properties of the Carolina, Clinchfield & Ohio Railway, the Carolina, Clinchfield & Ohio Railway of South Carolina, and the Clinchfield Northern Railway of Kentucky.

In response to a circular letter of February 9, 1924, signed by Hon. H. C. Hall, Chairman of the Interstate Commerce

Commission, and addressed "To all Persons Who Have Intervened or Filed Appearances" in the above named proceeding, Atlantic Coast Line Railroad Company and Louisville & Nashville Railroad Company, applicants herein, herewith submit memorandum of the views of these applicants regarding the arrangement to be sanctioned and required in case the decision of the Commission is favorable of the control of the Carolina, Clinchfield & Ohio Railway and its subsidiaries by the applicants.

[fol. 42] The consideration herein below set forth is given specifically to the ten conditions suggested and set out in said letter.

The views of the applicants, as aforesaid, follow.

Italics appearing throughout this memorandum are ours.

Condition No. 1

(1) The applicants shall maintain the Carolina, Clinchfield & Ohio Railway as a separate corporate entity and shall establish and maintain a separate organization for the combined properties of that company and its subsidiaries so that the three companies shall constitute a separate operating unit with a responsible management directly in charge of the operations of such properties.

This conditions presents two propositions, to wit:

(1) Maintenance of Separate Corporate Entity:

This Condition is impracticable, in that it requires that "*applicants* shall maintain the Carolina, Clinchfield & Ohio Railway as a separate corporate entity". When it is recalled that the arrangement under consideration contemplates only the lease by the applicants of the physical property and assets enumerated, belonging to the Lessors, but does not contemplate acquisition of the franchise to be a corporation, it will at once be perceived that the applicants have no power further than that granted by the lease over the corporate affairs of the Lessors.

It is a fact that under the provisions of the lease the Lessors agree that they will, during the term thereof, maintain the corporate existence of the Carolina, Clinchfield & Ohio [fol. 43] Railway and of its subsidiaries, and arrangements

are made for the payment of the expense thereof by the Lessees.

We submit, therefore, that there is no necessity for the imposition of further conditions on this point, even if it were within the power of the Lessees to regulate and carry the same into effect.

(2) Maintenance of Separate Operating Organization:

The second provision of the Condition requires that the Lessees shall establish and maintain a separate organization for the leased property so that the same shall constitute a separate operating unit, with a responsible management directly in charge of said operation. It has been declared at the hearing and stated during the argument that the purpose of the Lessees is to establish such a separate operating organization and to maintain and operate the leased property as an operating unit in accordance with the terms suggested in this Condition. There has been no change in the purpose and intention of the Lessees in this respect. The Lessees, however, do not feel that they can, with fairness, bind themselves to continue this proposed condition for the period of this lease. They submit that the exigencies of the situation do not require any such fixing, in an immutable manner for the long term of this lease, of their present plan. It is the purpose of the Lessees, if this lease is approved, to maintain and operate the leased properties in such manner as will enable them to give the public the most efficient transportation at the lowest reasonable cost. It cannot, at this time, be said that an arrangement for the [fol. 44] operation of these properties as a separate unit during the period of this lease will be found the best method of accomplishing this purpose. The Lessees, if they are to assume the financial and other obligations involved in this contract, desire to be left free, and feel that they have a right to demand that they be left free, to exercise their business judgment as to the best and most economical and convenient method of operating the leased properties within the limits and requirements of the Act to Regulate Commerce and other regulatory statutes governing the same.

The Commission is reminded that under the present policy of Congress, rates are to be adjusted so that the carriers of the country, as a whole or by rate groups, "will, under

honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment earn an aggregate annual net railway operating income equal as nearly as may be to a fair return upon the aggregate value of the railway property of such carriers, held for and used in the service of transportation." This Commission, in adjusting the future rates that may be charged by the carriers will base these rates upon an operating expense which is predicated upon such an honest, efficient and economical management of the railroad properties. It certainly would not be fair to tie the hands of these applicants so as to make impossible, if future necessity demands, the elimination of overhead expense, the centralization of management, and any other proper and lawful economy that may be found advisable under such honest and economical management of this leased property. For these reasons, applicants feel that this provision is unacceptable as a part of this lease.

[fol. 45]

Condition No. 2

(2). The Louisville & Nashville Railroad Company shall, within six months after the date hereof, file with the Commission its application under paragraph (18) of Section 1 of the Interstate Commerce Act for a certificate of public convenience and necessity to construct the proposed connections between its McRoberts line and its Harlan County branch on the one hand, and the Clinchfield on the other, and, in the event it proposes to acquire existing lines for use as part of such connections, under such other provisions of the act as are pertinent; and shall, if in such proceeding it is found that the present or future public convenience and necessity require or will require the construction of either or both such connections, proceed with such construction in accordance with the terms of the certificate issued in such proceeding.

In the main, this condition is acceptable to applicants.

The limitation of the time within which application under paragraph (18) for certificate of public necessity and convenience must be filed, is, we feel, inadequate. As indicated to the Commission at the hearing and during the argument, there are several tentative and possible routes available

for the construction of the connecting lines from the Louisville & Nashville to the Clinchfield. Applicants cannot properly complete the necessary surveys and subsequent selection and location of these several routes within six months, and respectfully suggest that the Condition be amended by substituting twelve months in place of six, so as to assure the necessary time for proper and complete surveys and location of the rights of way desired, and preparation thereafter, of application for certificate under Section 1, paragraph (18) of the Act.

[fol. 46] Conditions No. 3 and No. 4

Both of these conditions have to do with related subjects, to wit, the maintenance of existing routes and gateways, the maintenance of present neutrality, and the affording of equal service, rates, and divisions to all connections, by the Clinchfield property. We can best consider them together.

We think the Conditions are altogether unreasonable. In order to present our views intelligently a few preliminary remarks are necessary.

Status of Applicants under the Law

The property of the several railroad companies now under consideration is private property impressed with a public use. Because of the rights of the public to use these properties they are subject to certain limitations imposed by law.

Inasmuch as they all engage in interstate commerce, they are subject to the limitations imposed by the Congressional policy for the regulation of interstate commerce by railroad, as set forth in the Act to Regulate Commerce and other Congressional acts of similar purpose. These limitations and rules of conduct must, of course, be observed in the management and operation of the several properties because they are impressed with the public use.

Nevertheless, as *private property,* their owners may, within the limitations and restrictions imposed by law, manage, operate and control them in such manner as they deem proper. They may apply to the management the principles of any other business which are applicable, and [fol. 47] which promise good results. The business of these companies is the sale of transportation at a profit. If they are to succeed they must make their product attrac-

tive to the public that buys transportation. Following ordinary business principles, they may attempt to do this, if it be practicable, by accepting a lower figure (approved by this Commission), for their product than their competitors, or they may improve and strengthen their plants, so as to enable them to furnish transportation that is quicker, or safer, or more regular in its conduct that that furnished and sold by their competitors. To this end, also, they are justified in expending money for the purpose of shortening routes, reducing grades, improving road-beds, and increasing train capacity, so that they may produce transportation more economically than their competitors. In other words, they are guaranteed by law the right of legitimate competition, and, like other owners of private property, they are protected by the Constitution in the enjoyment of the fruits of their labors, within the State and Congressional limitations above mentioned. They are entitled to all of the privileges accorded by that policy to other companies owning private property impressed with a similar public use.

As was said by the Supreme Court in the Southwestern Bell Telephone case, decided May 21, 1923:

"It must never be forgotten that while the State may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies and is not clothed with power of management incident to ownership * * * 'The Commission is not the financial manager of the corporation and it is not em- [fol. 48] powered to substitute its judgment for that of the directors of the corporation.'" (Southwestern Bell Tel. Co. v. Public Service Com. of Mo., 67 L. Ed., Adv. Sheets, 619.)

We believe that these preliminary observations will not be controverted.

Practical Considerations

With these statements in view, we will now proceed to examine Condition 3, which is, in words and figures following:

Condition No. 3

(3) Existing routes and channels of trade and commerce heretofore established by other carriers in connection with

the Clinchfield shall be preserved, existing gateways for the interchange of traffic with such other carriers shall be maintained, and the present neutrality of handling traffic inbound and outbound by the Carolina, Clinchfield & Ohio Railway and its subsidiary, the Carolina, Clinchfield & Ohio Railway of South Carolina, shall be continued so as to permit equal opportunity for service to and from all connecting lines reached by the line of the Clinchfield Companies without discrimination as to routing or movement of traffic which is competitive with traffic of the applicants, or either of them, and without discrimination against such competitive traffic in arrangement of schedule.

Analyzed, this condition would impose as a part of the lease three distinct requirements, to wit:

(a) That all existing (through) routes with other carriers shall be preserved for 999 years, the term of this lease.

[fol. 49] (b) That all existing gateways for the interchange of traffic with other carriers shall be maintained for 999 years.

(c) That the present neutrality for handling traffic, inbound and outbound, by the Clinchfield shall be continued for 999 years.

In order to obtain and afford—

(1) Equal service to and from all connecting lines of the Clinchfield;

(2) Assurance of no discrimination as to the routing or movement of traffic which is competitive with traffic to the Lessees over the Clinchfield; and

(3) Equality of schedule afforded connections of the Clinchfield with the schedules given the Lessees,

it is proposed to compare the requirement of this Condition with the general policy of the Congress in establishing the limits within which interstate carriers are assured freedom of action.

The present policy of the Congress as to the maintenance of through routes and existing gateways is found

in Section 208, paragraphs (a) and (b), of the Transportation Act, 1920, which is printed in the margin.

[fol. 50] Analyzed, this Congressional policy requires the continuance of existing through routes, by requiring continued maintenance of rates, fares and charges in effect on February 29, 1920, until such time as they shall be changed by State or Federal authority, and by requiring that all divisions of joint rates, fares and charges in effect on said date shall be continued in effect by the carriers interested until changed either by mutual agreement between said carriers, or by State or Federal authority.

The first effect of the suggested condition would be to incorporate into the title to be acquired by the Lessees under this lease, a provision that all such routes in effect on the date of execution shall inevitably be continued for 999 years; that all gateways for the interchange of traffic with connections of the Clinchfield shall, in like manner, be continued for 999 years. It is, therefore, at once apparent that while the law affords connecting carriers the right to terminate existing through routes by cancelling

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"Sec. 208 (a) All rates, fares, and charges, and all classifications, regulations, and practices, in any wise changing, affecting, or determining, any part or the aggregate of rates, fares, or charges, or the value of the service rendered, which on February 29, 1920, are in effect on the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by State or Federal authority, respectively, or pursuant to authority of law; but prior to September 1, 1920, no such rate, fare, or charge shall be reduced, and no such classification, regulation, or practice shall be changed in such manner as to reduce any such rate, fare, or charge, unless such reduction or change is approved by the Commission.

"(b) All divisions of joint rates, fares, or charges, which on February 29, 1920, are in effect between the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by mutual agreement between the interested carriers or by State or Federal authorities, respectively."

existing divisions of through rates upon mutual consent, the suggested Condition would "freeze" the present situation and deny the lessees the right of cancellation under such conditions, or even with the approval of the Commission, at any time during the continuance of the proposed lease. Please note, at this point, that no similar limitation is imposed upon the connections of the Clinchfield, because none of those connections are parties to this lease and could, in no wise, be bound by the terms thereof.

It it, therefore, obvious that this Condition would deny to these applicants freedom of action that may be enjoyed by all other interstate carriers in the country subject to the Congressional limitations; would deprive them, during [fol. 51] the period of the lease, of all right to seek better terms or conditions for the interchange of traffic with their connections, and would force these Lessees to give and grant to any existing connections, free of charge or compensating advantage, during the continuance of this lease, the present neutrality of handling traffic and to afford to every such connection—

"equal opportunity for service to and from all connecting lines reached by the line of the Clinchfield without discrimination as to routing or movement of traffic which is competitive with the traffic of the applicants or either of them."

Expressed in another way, this Condition says to the applicant—

"You may take this property under lease, subject to these conditions. Under Condition 2, one of you must expend a minimum of $6,000,000 in building two new railroads through the mountains. The other must expend so many millions as are necessary under business considerations, to enable it effectively to handle the traffic that will be produced, but having made this expenditure you must guarantee that you will give every other carrier desiring to use it, routes, schedules and service equal to those which you obtain yourself—and you cannot ask or require any such connection to bear any part of the capital investment necessary, nor can you demand any consideration by way of exchange of traffic from such connection as compensation for that guarantee."

We submit that to state the proposition is to answer it. It is unreasonable. It will deprive these applicants [fol. 52] of any right to exercise their business judgment in trading with their connections for business. Again, it would say to these applicants—

"You may improve your plant so as to reduce your operating expense and enable you to produce a better article of transportation at a lower cost than your competitor, but you must give your competitor the full fruits of your investments so as to enable him, at your expense, to produce his article with your plant."

Condition 4 is, in form, as follows:

Condition No. 4

(4) The applicant shall permit the line of the Clinchfield and its subsidiaries to be used as a link for through traffic, via existing gateways of interchange, or via such gateways as may hereafter be established under authority of the Commission by means of the connecting lines which the Louisville & Nashville Railroad Company proposes to build, equally available to such other carriers, now connecting, or which may hereafter connect, with the line of the Clinchfield and its subsidiaries, as may desire to participate in through routes and joint rates between points in territory north and west of the line of the Clinchfield and points at and beyond the Ohio River on the one hand and points in the southeastern territory on the other, under divisions to be agreed upon by the applicants, or either of them, and/or the Clinchfield organization, on the one hand, and by the other participating carrier or carriers on the other, which shall not discriminate as to rates against [fol. 53] such participating carrier or carriers as compared with the applicants, or either of them; the intention of this provision being that the line of the Clinchfield and its subsidiaries shall be maintained as an open route equally available to all carriers connecting with the Clinchfield for traffic between the points designated.

Analyzed and simplified, this Condition would require of the applicants—

(1) That they permit the Clinchfield to be used as a through link for the interchange of traffic by any present or future gateway of the Clinchfield or of the connecting lines to be built by the Louisville & Nashville;

(2) Such use to be granted any competitor of the applicants who may desire to adopt it;

(3) Under divisions to be agreed upon but which must be equal to those allowed the Lessees;

(4) Which divisions shall not discriminate against competitors of the Lessees even as to traffic between points competitive as to the Lessees or either of them and such connections, to the end that—

(5) "the line of the Clinchfield and its subsidiaries shall be maintained as an open route equally available to all carriers connecting with the Clinchfield for traffic between points" at and beyond the Ohio River and points north and west of the Clinchfield on the one hand and points in the southeastern territory on the other hand.

This Condition, taken in connection with Condition 3, accentuates and makes more certain the conclusion drawn from that Condition, as above set forth. It makes clear [fol. 54] the proposition that the applicants may take this lease only upon condition that after building the connecting roads and making the other investments necessary they give the full benefit of their property, without compensation, to any competitor who desires to use it.

It is submitted that this imposes an obligation greatly beyond that required of other connecting carriers by the policy of the Congress as set forth in the Act to Regulate Commerce.

Congress Has Protected the "Long Haul"

As intimated above, the purpose of the applicants in seeking authority to make this lease is to enable them to produce for sale a better and more expeditious transportation at lower cost than their present plants make possible. *The outstanding justification for the capital expenditures necessary is the assurance contained in the policy of Congress, as set out in the Act to Regulate Commerce, that*

they shall not be deprived of the proper use of the plant that their investment produces.

Congress, in order to protect the public, has empowered this Commission, by paragraph 3 of Section 15 of the Act, to make, upon its own initiative, through routes and joint rates, fares or charges, and to fix the divisions of such rates, fares or charges as between the participating carriers, but by Section 15, paragraph 4, Congress has provided that this Commission *shall not*—

" * * * require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreason- [fol. 55] ably long as compared with another practicable through route which could otherwise be established."

It is at once apparent, upon reading Condition 4, that if this Commission should require its incorporation as a part of this lease, it would, thereby, do the very thing which Congress has specifically said it may not do. This provision limiting the power of the Commission was incorporated in the Act for the obvious purpose of assuring all carriers subject to the Act that they should not, as a part of the necessary regulation, be required to give to their competitors the benefit of their own facilities for competitive business under the conditions named.

It is respectfully submitted, therefore, that the Commission, even if it should desire to do so, would be transcending its authority under the Act if it required the acceptance of these two Conditions, and we think that we can show from the decisions of the Courts, and of the Commission, that this limitation of its power has heretofore repeatedly been recognized.

Legal Considerations

We submit, herewith, a brief review of the law, with some of the decisions applicable, sustaining the foregoing conclusions.

The law applicable and the reasons for it, depend upon certain basic propositions:

1. *Congress cannot delegate to an administrative body the power of legislation which has been delegated to Congress by the people, but it may create an administrative body to determine facts and thereon to apply the laws that it enacts.*

[fol. 56] In Marshall Field & Company vs, Clark, 143 U. S. 694, Mr. Justice Harlan said:

"The legislature can not delegate its power to make a law, but it can make a law to delegate a power to determine some fact upon which the law makes, or intends to make its action depend. To deny this would be to stop the wheels of Government. There are many things upon which wise and useful legislation must depend which can not be known to the lawmaking power, and must therefore be a subject of inquiry and determination outside the halls of legislation."

See also:

Buttfield vs. Stranahan, 192 U. S. 470-496;
Union Bridge Co. vs. U. S., 204 U. S. 364, 378-9 and 386;
United States vs. Grimaud, 220 U. S. 506-521.

In St. Louis, &c. Co. v. United States, 188 Federal 191, in considering the right of the Secretary of Agriculture under an Act of Congress to add to the class of railroad companies or to the class of acts denounced by the statute, the Court said:

"The Congress did not in fact delegate, and it could not delegate to the Secretary of Agriculture, or to any other executive officer the power to add to the class of railroad companies or to the acts punishable under this statute such others as in his judgment ought to be punishable thereunder.

"A legislative body may delegate the power to find some fact or situation on which the operation of a law is conditioned, or to make and enforce regulations for the execution of a statute according to its terms.

[fol. 57] *"But it can not delegate its legislative power, its power to exercise the indispensable discretion to make, to add to, to take from or to modify the law.* 'The true distinction,' says Judge Ranney for the Supreme Court of Ohio, in C. W. & Z. Co. vs. Commissioners, 1 Ohio State, 77-88, in a declaration which has been repeatedly approved by the Supreme Court, 'is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution to be exercised under and pursuant to the law. The first can not be done. To the latter no valid objection can be made.' "

2. *The Interstate Commerce Commission was created as such an administrative body, to enforce the policy declared by Congress in regulationg interstate commerce by railroad, but was not created nor authorized to make or declare a policy for Congress and the country.*

The Act to Regulate Commerce, in creating this Commission, indicates its purpose in its declaration (Act to Regulate Commerce, Section 12, paragraph (1)) that—

"the Commission is hereby authorized and required to execute and enforce the provisions of this Act."

The language of Congress makes it clear that the function of the Commission is to enforce and execute the national policy fixed by Congress, but that it is neither required nor authorized to make that policy or to add to the requirements included therein by Congress.

This principle was clearly recognized by the Supreme Court in Harriman vs. Interstate Commerce Commission, [fol. 58] 211 U. S. 407. In that case there was involved the power of the Commission to require a witness to answer certain questions propounded in an investigation instituted by the Commission on its own motion. The Court said, at pages 417-18, 422:

"The contention of the Commission is that it may make any investigation that it deems proper, not merely to discover any facts tending to defeat the purposes of the act of February 4, 1887, but to aid it in recommending any

additional legislation relating to the regulation of commerce that it may conceive to be within the power of Congress to enact; and that in such an investigation it has power, with the aid of the courts, to require any witness to answer any question that may have a bearing upon any part of what it has in mind."

"Before taking up the words of the statute the enormous scope of the power asserted for the Commission should be emphasized and dwelt upon. The legislation that the Commission may recommend embraces, according to the arguments before us, anything and everything that may be conceived to be within the power of Congress to regulate, if it relates to commerce with foreign nations or among the several states. And the result of the arguments is that whatever might influence the mind of the Commission in its recommendations is a subject upon which it may summon witnesses before it and require them to disclose any facts, no matter how private, no matter what their tendency to disgrace the person whose attendance has been compelled."

"No such unlimited command over the liberty of all citizens ever was given, so far as we knew, in constitutional times, to any Commission or court."

[fol. 59] "How far Congress could legislate on the subject-matter of the questions put to the witnesses was one of the subjects of discussion, but we pass it by. Whether Congress itself has the unlimited power claimed by the Commission, we also leave on one side. It was intimated that there was a limit in Interstate Commerce Commission v. Brimson, 154 U. S. 447, 478, 479, 38 L. Ed. 1047, 1057, 1058, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep., 1125. Whether it could delegate the power, if it possesses it, we also leave untouched, beyond remarking that so unqualified a delegation would present the constitutional difficulty in most acute form. It is enough for us to say that we find no attempt to make such a delegation anywhere in the act."

3. *It follows from the foregoing that the Commission, in enforcing the policy of Congress, as declared in the Act to Regulate Commerce, must act within the limits of the policy of Congress, as declared by that Act, and must*

make its decisions in accordance with the rules of decision laid down therein by Congress for its guidance.

In Interstate Commerce Commission vs. Goodrich Transit Co., 224 U. S., 194, there was involved the validity of the uniform accounting rules promulgated by the Commission. The rules were held valid. In the course of its opinion, the Court said:

"The Congress may not delegate its purely legislative power to a Commission, but having laid down the general rules of action under which a Commission shall proceed it may require of that Commission the application of such rules to particular situations and the *investigation of facts* [fol. 60] *with a view to making orders in a particular matter within the rules laid down by the Congress.* This has been frequently stated and illustrated in recent cases and needs no amplification here * * * In other words, Congress has laid down general rules for the guidance of the Commission, leaving to it merely the carrying out of details in the exercise of the power so conferred. This, we think, is not a delegation of legislative authority."

The principle is again announced in a recent decision of the Supreme Court. In Wichita etc. Co. v. Public Utilities Commission of Kansas, 260 U. S., 48, the Court said:

"The maxim that a legislature may not delegate legislative power has some qualifications, as in the creation of municipalities, and also in the creation of administrative boards to apply to the myriad details of rate schedules the regulatory police power of the State. The latter qualification is made necessary in order that the legislative power may be effectively exercised. *In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action.*"

From this it follows that—

4. *A decision by an administrative body, or by this*

Commission, which requires more of a carrier engaged in interstate commerce than is required by the policy of Con-
[fol. 61] *gress, as declared in its statutes, in effect amounts to legislation by the Commission and as such is invalid.*

In Williamson vs. United States, 207 U. S., 425, there was involved the validity of a regulation prescribed by the Commissioner of the General Land Office, purporting to act under Section 3 of the Timber and Stone Act of 1878. The Court said:

"It remains only to consider whether it was within the power of the Commissioner of the General Land Office to enact rules and regulations by which an entryman would be compelled to do that at the final hearing which the act of Congress must be considered to have expressly excluded, in order thereby to deprive an entryman of a right which the act by necessary implication conferred upon him. To state the question is to answer it. As observed in Adams vs. Church (p. 517) *'To sustain the contentions * * * would be to incorporate * * * a prohibition against the alienation of an interest in lands not found in the statute or required by the policy of the law upon the subject.'* True it is that in the concluding portion of section 3 of the Timber and Stone Act it is provided that 'effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office.' But this power must, in the nature of things, be construed as authorizing the Commissioner of the General Land Office to adopt rules and regulations for the enforcement of the statute, *and can not be held to have authorized him, by such an exercise of power, to virtually adopt rules and regulations destructive of rights which Congress had conferred.*"

[fol. 62] In United States vs. 11150 Pounds Butter, 188 Federal, 157, there was involved the validity of a regulation adopted by the Secretary of the Treasury. The Act provided that butter should be confiscated if it contained "an abnormal quantity of moisture." The regulation prescribed by the Secretary of the Treasury provided that it could be confiscated if it contained more than 16%. The Court held the ruling void, and said:

"The Secretary has stricken out the word 'abnormal' and has inserted the words 'more than sixteen per cent.' To my mind, *this is not a regulation for the purpose of carrying the law into effect; it is rather a rule for the construction of the law. It is a change in the law;* it is fixing a standard which Congress never intended the Secretary should have power to fix. While the execution of the law must be given to the administrative department, its construction must be left with the courts * * *."

We have recited these principles and the cases sustaining them merely as a matter of convenience.

The Commission has, in one of its most recent decisions, recognized that in regulating interstate commerce by railroad it, as an instrumentality of Congress, may exercise jurisdiction only within the limits of the power delegated to it by Congress; thus, in dismissing the complaint filed by the Wisconsin and Michigan Railroad Commissioners as to passenger train service, which order is reported in the Railway Age of February 16, 1924, page 434, this Commission says:

"It is scarcely debatable that the broad provisions of the Constitution with respect to commerce among the [fol. 63] States vests in the Congress the power to regulate the operation of passenger trains, *but as an instrumentality of that body we may exercise jurisdiction only within the limits of the power delegated to us.* In the absence of specific language only the most unmistakable evidence of an intention to confer upon us power to act under given circumstances would warrant the assumption of such power through our own construction of the act. We accordingly find that jurisdiction to regulate the operation of passenger trains has not been vested in us. The complaints will be dismissed." (I. C. C. Docket No. 14967.)

Taking now the principles outlined by the foregoing and applying them to the instant case:

Condition No. 3 and Condition No. 4, as suggested in the letter of Chairman Hall, would require that the Clinchfield and its subsidiaries be maintained as an open route, open to all carriers connecting with the Clinchfield, "without discrimination as to routing or movement of traffic which is competitive with traffic of the applicants, or either

of them" (Condition No. 3) and upon divisions "which shall not discriminate as to rates against such participating carrier or carriers as compared with the applicants (Lessees) or either of them (Condition No. 4)."

The obvious effect of these two Conditions would be to require of these Lessees, in their control of the Clinchfield, the abandonment of the protection afforded them by the Congressional policy as declared in Section 15, paragraph (4) of the Act to Regulate Commerce, providing that no carrier shall be required to use substantially less than its entire line in making through routes over its line for its [fol. 64] competitors and this burden would be applied as a limitation upon the title that the applicants would take under the proposed lease and would be binding upon them and their successors in such title for the full period of the life of the lease.

This Commission has held in cases too numerous to be set out that in establishing a through route it cannot compel a carrier to include substantially less than its entire line. See—

28 I. C. C. 518-23.
28 I. C. C. 621-30.
29 I. C. C. 106-108; 376-9; 583-91; 607-8; 609-18.
31 I. C. C. 472-6.
38 I. C. C. 367-8.
45 I. C. C. 227-9.
80 I. C. C. 314.
81 I. C. C. 718.

If the Conditions were imposed it would, as indicated above, amount to a requirement by the Commission, through indirection, of a condition that it could not impose directly.

We therefore submit that Conditions 3 and 4, as expressed in the letter of Chairman Hall, are unreasonable, would be unfair, and, we think, would be illegal. *They would prohibit the consummation of this lease.*

Condition No. 5

(5) The Clinchfield shall accept, handle, and deliver all cars, inbound and outbound, loaded and empty, without discrimination in promptness or frequency of service be-

tween cars destined to or received from competing carriers, and irrespective of destination or route of movement.

[fol. 65] This Condition would require of the Lessees acceptance for handling and delivery of all cars from competitors of the Lessees upon the same terms as cars from the Lessees themselves, irrespective of destination or origin or route.

The Condition is evidently suggested by and taken from the conditions accepted by applicants in the Chicago Junction case, being similar in form to Condition No. 7 incorporated in the approval of the Commission in that case (Finance Docket No. 1165). We can readily see the bearing of this Condition and the reason for its acceptance in the Chicago Junction case: The Chicago Junction Railroad and the properties to be acquired in that case were, prior to the approval of the application, performing terminal service for trunk line roads entering Chicago, into the central manufacturing district of that city and into the stock yards. The Junction Railroad and other property involved was not in any sense a part of a through line; it was performing only terminal or switching service. In doing this service it had accepted, handled and delivered cars, inbound and outbound, loaded or empty, without discrimination as between carriers entering Chicago. It was essential that, as a terminal facility, the public be assured of a continuance of this terminal service and the condition was therefore suggested and, as we understand, was accepted without objection by the applicants.

The situation recited in the Chicago Junction case is entirely dissimilar to the situation now under consideration. The Clinchfield properties are and will be part of a through trunk line from the Ohio to the sea. Under the [fol. 66] existing law, the Clinchfield can only accept cars moving upon routes that are established, for which rates are published and filed, according to law. This, by law, it must continue to do. Where no rate is filed the Clinchfield is prohibited from handling cars. There is, therefore, no question involved of protecting the public in any right that may be jeopardized by this lease. The Condition, as suggested, would make it obligatory upon the Lessees to require the Clinchfield to accept, handle, and

deliver *all* cars destined to or received from connections, "irrespective of destination or route of movement." It therefore appears that the language of the Condition, which was applicable in the terminal case, would be inapplicable and would lead to unreasonable and possibly unlawful results, if strictly construed as applied to the Clinchfield.

In its application from a practical railroad standpoint the Condition, as applied to the Clinchfield case, would be equally unsound. An illustration of its possible effect:—The Lessees are seeking to acquire the Clinchfield for the purpose of establishing a through line. It is their purpose to provide for through movements of traffic originating on the line of either of the Lessees over the Clinchfield to destination on the line of the other, or beyond. It is entirely probable that, in an effort to render expeditious service, special train movements may be provided and scheduled for the accommodation of the traffic accumulated by either Lessee, destined over the Clinchfield. As a matter of course, in return for this traffic turned over the Clinchfield by the Lessees, the Lessees will get preferential [fol. 67] treatment on all traffic originating on the line of the Clinchfield destined to points on the lines of the Lessees. In other words, the arrangement between the Lessees and the Clinchfield will be reciprocal and for business and service given by one, there will be business and service returned by the other.

Under Condition No. 5, if strictly applied, the Clinchfield would be required to furnish connections competitive with the Lessees exactly the same frequency of service and promptness of movement inbound and outbound that it furnishes to the Lessees but the Clinchfield would get and could demand no assurance of traffic from these competitors of the Lessees in exchange for the service so rendered. If the Lessees established a service which produces a hundred cars a day, each way, and the Clinchfield, in order to move it, provided a special scheduled train, any competitor of the Lessees could, under the terms of this Condition, demand a special scheduled train movement for such traffic as it might deliver, even though its deliveries did not reach ten cars a day. Illustrations could be multiplied.

We respectfully submit that the foregoing demonstrates the unreasonableness of the Condition.

Condition No. 6

(6) Whenever additional cars are required for outbound loading, because of inadequacy of available car supply on the Clinchfield lines at any given time, for any cause, orders for such additional cars shall be accepted from the shipper by the local Clinchfield organization and by it promptly transmitted to the designated connecting line without discrimination, and all cars ordered by and de-
[fol. 68] livered to the Clinchfield shall be promptly moved to the shippers by the Clinchfield without discrimination on account of the proposed route.

This Condition is wholly unnecessary as applied to this case. In its present form, it would require of the Clinchfield that it should accept from a connection cars ordered by a shipper located on the Clinchfield and deliver all such cars promptly to such shipper without discrimination because that shipper proposed to route the same over the line of the connection furnishing the cars.

In times of car shortage this Condition, as now drafted, would require a violation of the law and the rules of this Commission. For instance, assuming that a car shortage existed on the Clinchfield and that with all the cars available the Clinchfield was able to supply its coal mines with only 75% of their car orders. Under this Condition a shipper on the Clinchfield could order one hundred cars from the Seaboard and this number of cars would be sufficient to give that shipper 100% of his car requirements. By this arrangement a discrimination would be worked against the other shippers on the Clinchfield who would be receiving only 75% of their requirements. Such an arrangement is contrary, inferentially, to the opinion of the Supreme Court in—

Lambert Run Coal Co. vs. Baltimore & Ohio, 258 U. S. 377;

Penna. R. Co. vs. Jacoby, 61 L. Ed. 165;

P. R. R. Co. vs. Stineman Coal Mining Co., 61 L. Ed. 316.

[fol. 69] It is also contrary to the opinion of this Commission in Assigned Cars for Bituminous Coal Mines, 80 I. C. C., 520.

Applicants are frank to say that, in their opinion, this Condition is unnecessary. We judge, from its similarity to Condition No. 6 in the Chicago Junction case that it was suggested by those conditions. We repeat here what we said with reference to Condition No. 5: The Chicago Junction road, being a terminal delivery road, would not, in the ordinary course of events, furnish any equipment to shippers located on its line. On the contrary, equipment for shippers destined to points on a given trunk line would, in the nature of things, be furnished by that Company upon orders by the shipper, and be delivered to the terminal company for placing. It was therefore meet and proper to require of the applicants that they would continue this acceptance and delivery of ordered cars.

The facts existing on the Clinchfield indicate the inapplicability of this Condition. It is inconceivable that under current railroad practice a shipper located at Kingsport on the Clinchfield, 183 miles from Spartanburg, would order ten empties from the Piedmont Northern to be delivered the Clinchfield at Spartanburg for movement, empty, 183 miles to Kingsport for loading, and yet this Condition would require this empty movement and make it impossible for the Clinchfield organization to use these cars to meet existing needs, even for local traffic between Spartanburg and Kingsport. We do not believe that under current or possible future conditions in railroad service any such practice as this will ever come into existence.

[fol. 70] The rights of the public and of connecting carriers of the character dealt with in Condition 5 and Condition 6, here under discussion, are met and fully protected by the provisions of Section 1, paragraphs (10), (11), (12), (13), (14), and (15) of the Act to Regulate Commerce. The power given to the Commission by those paragraphs is deemed by the Congress sufficient to enable the Commission to regulate matters of this character as to all other carriers of the country. It is sufficient to enable the Commission to regulate the relations between the Lessees and connections in this case. We, therefore, respectfully submit that Condition 6 is unreasonable, unnecessary, and should not be made a part of the lease.

Condition No. 7

(7) It shall be expressly provided by the lease, as executed, that no securities shall be issued by the lessors, or any of them, except with our approval where such approval is required under the provisions of Section 20a of the Interstate Commerce Act; and that the par value of stock and/or the principal amount of bonds or other securities issued to refund maturing obligations or to reimburse the lessees for expenditures made as provided in the lease, shall not on the one hand exceed the principal amount of the securities refunded, and on the other, the amount of actual expenditure for additions, betterments, extensions or improvements properly chargeable under our accounting classification to capital account.

This Condition expresses the purpose of the Lessees in the lease, as drawn, and is acceptable to the applicants. [fol. 71] Conditions 8 and 9 will be considered together. They are in the words and figures following:

Condition No. 8

(8) The proposed lease when executed shall contain a provision that the same shall become null and void and of no effect whenever the Commission shall find that the control, acquisition of which is approved and authorized by this order, interferes with the consummation of the complete plan of consolidation adopted and published under the provisions of Section 5 of the Interstate Commerce Act.

Condition No. 9

(9) The control herein authorized by lease shall be held subject to termination by order of the Commission if and when found by the Commission to interfere with the consummation of its complete plan of consolidation under the provisions of Section 5 of the Interstate Commerce Act, and for this purpose the Commission will reserve full jurisdiction over the case to make such order or orders as, after hearing, it may deem to be necessary and appropriate.

These Conditions put an entirely new aspect upon the entire case. If they are required, the character of the trans-

action is wholly changed and what now seems a reasonable and proper business venture will be converted into a gamble, not justifiable upon any principle of business or rule of prudent action.

The Conditions provide—

(8) That the lease proposed shall, *ipso facto*, become null and void whenever the Commission finds that it interferes [fol. 72] with the consummation of the complete plan of consolidation adopted by the Commission under the provision of Section 5 of the Act to Regulate Commerce;

(9) That the lease may be terminated at any time by order of the Commission if it finds that it interferes with the consummation of said consolidation plan.

(1) Practical Aspects of Conditions 8 and 9

To realize the full import of these two Conditions, it is necessary to rehearse some of the fundamental facts underlying and justifying the application for authority to make this lease.

The Louisville & Nashville serves the coal fields in Kentucky. The only outlet is to the west and north. This outlet provides the Louisville & Nashville with a good haul and with a revenue producing business. An outlet to the east is possible by the construction of two lines of approximately 12 and 25 miles in length. There is a further possibility of getting a low grade connecting line from one of these fields over a longer haul of some forty odd miles. The two shorter connections could be built for approximately $6,000,000. If the longer line is adopted it will cost considerably more.

The Louisville & Nashville cannot possibly justify the expenditure of $6,000,000. for the construction of these two connections if it is to obtain only the 12 mile and the 25 mile haul, respectively, in addition to its present line to the loading point. It can justify the expenditure if, in addition to this connecting link, it receives one-half of the haul over the Clinchfield property. It therefore expresses its willingness and purpose to build these lines in the event [fol. 73] the lease is approved and it acquires a joint control, thereby, of the Clinchfield property.

Condition No. 2, suggested above, if incorporated, will make it incumbent upon the Louisville & Nashville to expend the $6,000,000. if the short connections are built or to expend more if the longer and better connection is adopted. The justification for the expenditure lies in the anticipation of continued business over these connections and over the Clinchfield.

Consider now the effect of Conditions 8 and 9. The Commission may reach a conclusion within six months after the connections are built that the Clinchfield should be allocated to some other system. In that event, Condition 8 becomes operative and the investment of $6,000,000. by the Louisville & Nashville is at once changed from a judicious and proper investment into a loss. No executive officer or director having due thought of the fiduciary nature of his office could possibly justify the expenditure of his stockholders' capital on any such uncertainty.

Condition 9 differs only in that an order of the Commission is required in addition to the decision that the Clinchfield should be allocated to some other system. It would render the entire plan impossible under the dictates of prudent investment.

The other applicant, Atlantic Coast Line Railroad Company, is in similar situation. The record shows that at the present time the Charleston & Western Carolina, the part of its system which connects with the Clinchfield, is in condition for handling light trains; that a revision of grades, increase of rail weights, rebuilding of bridges, increase of equipment, power and capacity, are all essential [fol. 74] to a proper realization of the fruits of its venture in entering upon this lease. The record does not indicate the estimated amount that will be required to revise and renew its line, but it does indicate that the capital investment will probably run into millions. Unless this lease and its consequent through connection, with the possibility of a through trunk line, is consummated, the investment of this capital is not justified, and yet Conditions 8 and 9 would make it possible that the entire investment would be wasted within six months after it was completed.

Legal Aspects of Conditions 8 and 9

These two Conditions carry, by necessary inference, the

thought that the Commission cannot, prior to the publication of its final plan of consolidation, authorize any form of acquisition of control of one carrier by another. We say this because the effect of the Condition is to make the authority for control subject to the formulation of the consolidated system as it shall finally be determined. The law does not sustain this thought or reason. That the union here proposed does not involve a "consolidation" which must await the "final plan" has been fully considered and decided by the Commission in Finance Docket No. 2613, Application of the Southern Pacific. In the last mentioned case, the Commission said:

"It is not enough to constitute such a consolidation that the carriers or their properties be consolidated into a single system for operation, or for management, or for management and operation, but it must also appear that they are [fol. 75] consolidated for ownership. Since each of the carriers will retain its corporate identity and the legal title to its property, no consolidation of the kind defined by the statute will result" (76 I. C. C. Rep., 524).

The record in this application shows that each of the carriers will retain its corporate identity and the legal title to its property, hence under the decision of the Commission aforesaid, the union does not constitute a "consolidation" of the kind defined by the statute and referred to in paragraph (6) of Section 5. Since this is true, the decision of this Commission in Application of the Pittsburgh & West Virginia, Finance Docket No. 1108, is pertinent and decisive. In that case, in discussing the right of the Commission to authorize an acquisition, either under lease or by purchase of stock, or in other manner not involving consolidation, without awaiting the adoption of the final plan of consolidation, the Commission said:

"The question has a prospective importance, however, if we decide that authorization of the purchase is necessary under Section 5, for no such authority may be granted under paragraph (6) until we have adopted a plan of consolidation under paragraphs (4) and (5), *while there is no similar limitation upon action under paragraph* (2)."

This application is definitely an application for authority

under paragraph (2). There is, therefore, no necessity under the statute as formerly construed by this Commission, either for deferring action upon this application until the final plan of consolidation is adopted, or for limiting [fol. 76] any action which may now be authorized so that the same shall conform to such final plan when it is adopted. To require such a condition of this applicant would be to deny the conclusion announced by the Commission in the Pittsburgh & West Virginia case last cited, and would require as prerequisite for the granting of authority under paragraph (2), a submission to the same limitation that is required as prerequisite to authorization of a consolidation under paragraph (6). Congress has not imposed any such limitation. It is submitted that the Commission should not attempt to do so.

The two Conditions are predicated upon the possibility that the Commission shall find that this lease "interferes with the consummation of its (the Commission's) complete plan of consolidation." It is difficult to define just what is meant by interference with the consummation of the complete plan of consolidation. Under the law as it now stands, the Commission is not charged with the "consummation" of any consolidation plan. Its duties under Section 5 of the Act to Regulate Commerce, are to "prepare and adopt a plan for the consolidation of railway properties of the Continental United States into a limited number of systems." Hearings are to be held and, thereafter, the plan adopted is to be published with a right to the Commission to amend it subsequently, if it deems necessary in public interest. Thereafter, the law provides methods by which the carriers themselves may take advantage of this plan and effect voluntary consolidations in accordance with its terms, always subject to the approval of the Commission. There is, however, nothing in the Act imposing upon this Commission the duty to see to it that the consolidation [fol. 77] it recommends are carried into effect. It is, therefore, difficult to see how the question of ownership or control of a given railroad property at the time that the plan is adopted or published can interfere with or affect in any way the Commission's duty in the premises or the consummation of its plan.

If the Commission decides, for instance, that the line

from Lynchburg, Va., to Durham, N. C., now a part of the Norfolk & Western, shall, as a part of the consolidation plan, become a part of the Seaboard Air Line, the Commission's duty in the premises is fulfilled when its plan is completed. The Commission's plan, when published, will not, under the law as it now stands, make a conveyance by the Norfolk & Western to the Seaboard Air Line obligatory. It will give the Seaboard a right to acquire the line in question from whoever owns it, but the acquisition of course must be made on terms acceptable to the seller and the buyer. No other means of acquisition is by the present law provided. If the Seaboard Air Line has to buy, or even if it had to condemn, under some possible future amendment of the law, the question of who owned the line referred to would not be very pertinent. If condemnation were ever authorized and became necessary it could be conducted against whatever company at that time owned the line.

In like manner, we submit it can make no possible difference in the consummation of the Commission's plan who owns or controls the Clinchfield road and its subsidiaries at the time its conclusions in the matter of consolidation are announced and published. If the Carolina, Clinchfield & Ohio Railway own it, it must be bought from them or ac- [fol. 78] quired in some manner yet to be established by law, but the Commission is not at present charged with any responsibility to see that it is acquired or transferred in any way whatsoever.

It is true that there is discussion in the public print, in the halls of Congress, and throughout the nation, generally, of a plan to be worked out under which the consolidation of the carriers of the country can be consummated and the matter has gone so far as the consideration and introduction into Congress of bills with that end in view. When those bills are enacted into laws they will, subject to the constitutional limitations, be binding upon the carriers and the people of the country. Until they are so adopted, it is beyond the duty of this Commission to undertake to provide either a means or a method for the doing of that which Congress still holds in abeyance.

We therefore respectfully submit that Condition 8 and Condition 9 are not acceptable and will invalidate the entire proposed transaction.

Condition No. 10

(10) This proceeding may be reopened at any time by order of the Commission either upon the initiative of the Commission, or, in the discretion of the Commission, upon the motion of any person claiming an interest in the matter, for the purpose of making such orders as the Commission may deem necessary or appropriate supplementary to the present order.

This Condition is practically a reassertion of paragraph (3) of Section 5 of the Interstate Commerce Act, which reads:

[fol. 79] "(3) The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1) or (2), as it may deem necessary or appropriate."

We construe the right of the Commission conferred by paragraph (3) of Section 5, above mentioned, to be a right to enter orders which are necessary to make more certain the carrying out of its purpose, as declared in the original order; to do things which supplement and complete the original order, but not to re-open a case and to add new conditions or to provide entirely new limitations, not contemplated by or contained in an original order, approving an acquisition of control of one carrier by another. If this view be correct, nothing whatever would be added to the power of the Commission by making Condition 10 a part of the lease, and its addition is wholly unnecessary.

If, however, it is intended by Condition 10 to reserve to the Commission the specific power to re-open this case and to impose new, or additional, or other conditions or obligations, not contemplated or set out or referred to in the original order of approval (if such an order be granted), it is at once apparent that Condition 10 becomes as objectionable and as fatal to the purpose of this proposed contract as Condition 8 or Condition 9 hereinbefore discussed. We are satisfied that the law, above quoted, has no such meaning; we do not believe Congress intended to give the Commission, by this reservation, power to disrupt a lease

formerly approved, and effected, and substitute an entirely new arrangement therefor, nor do we conceive that the Commission has any such purpose in suggesting the incorporation of this Condition.

[fol. 80] With this view in mind, we submit that the addition of Condition 10 to the lease will not add any protection to the public, will not increase the powers of the Commission, and will only complicate and render doubtful the nature of the Lessees' title. We say this because any lawyer examining the title, and finding this condition incorporated in the title deed, will at once have doubts raised in his mind as to why the Commission saw fit to incorporate it in the deed of lease, unless it intended the Condition to have greater effect than the provisions of the law already in existence. Such a doubt would unduly and unnecessarily hamper the Lessees in the proper development of the Clinchfield, in the marketing of securities to be issued by the Clinchfield for the purpose of providing additions and betterments, and would complicate the situation without any corresponding benefit to anyone.

We, therefore, respectfully request that Condition No. 10 be not made a part of this lease.

We trust that the Commission will not feel that the Applicants are captious in objecting to the inclusion of conditions in this Lease which are substantially the same as provisions of existing law. Our thought is that so long as such conditions are covered by an existing law, the Applicants, as Lessees, must observe and obey the same, but incorporation of the terms of existing law, as a part of the title deed under which this property would pass, (if the necessary approval is granted), will convert existing law into a matter of contract between the Lessors and the Lessees, and, would possibly be construed to vest in connecting carriers, as a matter of right, privileges covered [fol. 81] thereby. In the event the law is hereafter amended, such amendment might have no effect upon the situation fixed by contract, as aforesaid, and might leave the Applicants subject to these conditions and deny them any advantageous participation in such changes as may hereafter be deemed appropriate by Congress. This, we conceive, would place the Applicants in a different and less favorable situation than the other carriers of the country,

and may possibly deny them rights they would otherwise exercise and enjoy. There is nothing whatever in the facts surrounding this application which makes it necessary or proper to place these carriers in a class by themselves.

Respectfully submitted.

George B. Elliott, Edward S. Jouett, Counsel for Applicants.

March 25, 1924.

[fol. 82] EXHIBIT NO. 4 TO BILL OF COMPLAINT

F-1378

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 3131

Clinchfield Railway Lease

Submitted March 25, 1924. Decided June 3, 1924

1. Acquisition by the Atlantic Coast Line Railroad Company and the Louisville & Nashville Railroad Company of joint control of the Carolina, Clinchfield & Ohio Railway and its subsidiaries, by lease, approved and authorized subject to certain conditions.

2. Authority granted to assume, as lessees, obligation of paying as rental for the property, rights, and franchises of the Carolina, Clinchfield & Ohio Railway and its subsidiaries amounts equivalent to dividends at certain rates upon $25,000,000 of common capital stock and interest upon certain bonds and equipment obligations of said railway in the amount of $28,292,000 now outstanding, and, as guaranteed by said lessor, upon $1,500,009 of Holston Corporation 5 per cent realty and collateral-trust convertible notes.

George B. Elliott, E. S. Jouett, E. C. Bailly, and H. G. Morrison for applicants.

George M. Napier, attorney general, for State of Georgia; A. J. Maxwell and George T. Bell for North Carolina Cor-

poration Commission; and Mason Manghum for State Corporation Commission of Virginia.

J. J. Campion, J. P. Dennis, and E. C. Bailly for Carolina, Clinchfield & Ohio Railway; E. C. Bailly for Carolina, Clinchfield & Ohio Railway, Carolina, Clinchfield & Ohio Railway of South Carolina, and Clinchfield Northern Railway of Kentucky; F. B. Grier for Charleston & Western Carolina Railway Company; C. R. Capps, W. L. Stanley, Forney Johnston, and J. F. Wright for Seaboard Air Line Railway Company; J. M. Hull, jr., Hull & Barrett, H. W. Purvis, and C. Murphey Candler for Georgia & Florida Railway, John Skelton Williams, receiver; and A. N. Cooke for Piedmont & Northern Railway Company.

John W. Chalkley and R. L. Parsons for Southeastern Railway Company, intervener.

Frederick M. Sackett and A. F. Vandergrift for Louisville Board of Trade; R. C. Tway for R. C. Tway Coal Company; G. B. Cornett, E. R. Clayton, and R. C. Tway for Harlan County Coal Operators' Association; S. R. Jennings for Hazard Coal Operators' Exchange; J. D. Murphy for Merchants' Association of Asheville; J. P. Mulherin for Board of Commerce of Augusta; W. H. Hendley for [fol. 83] Spartanburg Chamber of Commerce and Spartanburg Transportation Association; George L. Taylor for Bristol Chamber of Commerce and Penn Lee Coal Corporation et al.; and R. L. Askea for Chamber of Commerce of Raleigh.

John P. Grace, Alfred Huger, Thomas J. Burke, Edgar E. Clark, and Clark & LaRoe for city of Charleston, S. C., intervener.

Thomas C. Guthrie, W. S. Creighton, and Tillett & Guthrie for Charlotte Shippers' & Manufacturers' Association, Charlotte Chamber of Commerce, Charlotte Merchants' Association, Charlotte Automotive Trade Association, city of Charlotte, mayor and commissioners, county of Mecklenburg, chairman of the board and commissioners, Charlotte Rotary Club, and Charlotte Kiwanis Club.

Report of the Commission

By the COMMISSION:

The Atlantic Coast Line Railroad Company and the Louisville & Nashville Railroad Company, hereinafter sometimes

designated, respectively, the Coast Line and the L. & N., carriers by railroad engaged in the transportation of passengers and property subject to the interstate commerce act, on July 20, 1923, filed their joint application under paragraph (2) of section 5, and under section 20a, respectively, of the interstate commerce act, (a) for an order approving and authorizing the acquisition, by lease, of control by the applicants of the railroad and properties of the Carolina, Clinchfield & Ohio Railway, hereinafter called the Clinchfield, and its subsidiaries, the Carolina, Clinchfield & Ohio Railway of South Carolina, and the Clinchfield Northern Railway of Kentucky, hereinafter designated, respectively, as the Carolina company and Kentucky company; and (b) for authority to assume certain financial obligations, as set forth in the lease and as herein more particularly described. The three companies last named will be referred to, collectively, herein as the carriers.

At the hearing held herein from September 24 to September 29, 1923, inclusive, objections to the granting of the application were interposed by the Seaboard Air Line Railway Company, hereinafter called the Seaboard, the receiver of the Georgia & Florida Railway, the Piedmont & Northern Railway Company, hereinafter called the Piedmont, and representatives of certain public and commercial bodies in the southeastern Seaboard States. The Southeastern Railroad Company, hereinafter called the Southeastern, a corporation organized for the purpose of constructing a line of railroad as hereinafter described, intervened, alleging an interest by reason of the proposed construction. The carriers, the Charleston & Western Carolina Railway Company, hereinafter called the Western Carolina, and repre- [fol. 84] sentatives of certain public and commercial bodies in territory served by the applicants and the carriers, intervened in support of the application.

The Governor and Railroad Commission of Florida, the Governor and Railroad Commission of Kentucky, and the Governor and Railroad Commission of Mississippi have indicated their approval of the application. The application was also approved by the Corporation Commission of Virginia, the Railroad Commission of South Carolina, and the Public Service Commission of Georgia. The State Corporation Commission of Virginia has rescinded its action

approving the application and stated that it has no representations to make in the premises. The Railroad Commission of South Carolina, by a vote of 4 to 3, has withdrawn its approval of the application and now recommends that it be denied. After approving the lease, the Public Service Commission of Georgia held a hearing and disapproved it by a vote of 3 to 2. Subsequently it filed with us a protest to the granting of the application, but stated that it would not be represented at the hearing before us. Later it withdrew its protest and indicated that it had no recommendations to make either for or against the lease. The Governor of Georgia was represented at the hearing by the attorney general of Georgia and has advised that the latter is of the opinion that the lease will be injurious to the State of Georgia and to its railroad.

The Corporation Commission of North Carolina made its report a part of the record at the hearing. The report is to the effect that the Clinchfield should not be permitted to remain a local property but should become a part of a comprehensive system of transportation by combination either with the Coast Line or the Seaboard.

The public authorities of the other States served by the applicants have either indicated that they have no objection to the granting of the application or have made no representations in the premises. Numerous resolutions and communications have been received from officers and governing bodies of various political subdivisions of States in which the applicants operate, and from civic and business organizations and from firms and individuals in those States, some in favor of and others in opposition to the granting of the authority sought.

The Clinchfield is incorporated under the laws of Virginia, the Carolina company under the laws of South Carolina, and the Kentucky company under the laws of Kentucky. The line of the company last mentioned extends from Elkhorn City, Ky., to a connection with the line of the Clinchfield at the Kentucky-Virginia State line, a distance of 2.79 miles; the line of the Clinchfield extends from the point last mentioned across southwestern Virginia, [fol. 85] northeastern Tennessee, and western North Carolina to a connection with the line of the Carolina company at the boundary between the Carolinas, a distance of 255.97 miles; and the line of the South Carolina company extends

from a connection with the Clinchfield at the point last mentioned to Spartanburg, S. C., a distance of 18.09 miles. The lines of the three companies form a continuous line from Elkhorn City, Ky., to Spartanburg, S. C., a distance of 276.85 miles. A branch of the Clinchfield extends from a connection with the Norfolk & Western Railway Company, hereinafter called the Norfolk & Western, at Carbo, Va., to Laurel, Va., a distance of 5.71 miles. The Clinchfield owns all the stock and bonds of the two other carriers. It operates its own lines and, under lease, the line of the Kentucky company. The Carolina company operates its own line. The total mileage operated by the carriers is 309.21 miles, including 22.05 miles operated under trackage-rights agreements.

The Coast Line, a Virginia corporation, owns about 4,800 miles of railroad and operates approximately 5,000 miles. It operates in Virginia, North Carolina, South Carolina, Georgia, Florida, and Alabama. It owns 51 per cent of the capital stock of the L. & N. The latter, a Kentucky corporation, owns approximately 4,760 miles of railroad and operates about 5,000 miles. It operates in Kentucky, Tennessee, Virginia, North Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Missouri, Ohio, Indiana, and Illinois. Each of the applicants control through stock ownership or lease, individually or jointly with the other or with other companies, numerous other lines of railroad.

The lines of the two systems roughly resemble the letter V, with the apex in Florida, the right arm extending northeasterly along the Atlantic coast, and the left arm westward to the Ohio River and beyond, with no connection between the arms north of Atlanta, Ga. The Coast Line, through its affiliated company, the Western Carolina, connects with the line of the carriers at Spartanburg. There is at present no direct physical connection between the line of the carriers and the L. & N., or any of its subsidiary or controlled lines. The Cumberland Valley division of the L. & N. extends from Corbin, Ky., through Middlesboro, Ky., and the Cumberland Gap to Norton, Va., where it connects with the Interstate Railroad and the Norfolk & Western. Both of these lines connect with the Clinchfield, the former at Miller Yard and the latter at St. Paul, Va. This line of the L. & N. also connects with the Virginia & Southwestern Railway, a subsidiary of the Southern

Railway Company, hereinafter called the Southern, at Appalachia, Va. The Virginia & Southwestern Railway connects with the line of the carriers at Speers Ferry, Va. The Interstate Railroad parallels the line of the L. & N. [fol. 86] between Appalachia and Norton. The terminus of the Lexington & Eastern line of the L. & N. at McRoberts, Ky., and the terminus of a branch of its Cumberland Valley line in Harlan County, Ky., are in close proximity to the line of the carriers. McRoberts is about 25 miles from the line of the carriers and the present terminus of the Harlan County branch is about 12 miles from the line of the L. & N. extending into Virginia through the Cumberland Gap. The line of the Sandy Valley & Elkhorn Railway Company extends from a connection with a line of the Chesapeake & Ohio Railway Company, hereinafter called the Chesapeake, at Shelby, to Denham, Ky., a distance of approximately 30 miles. The line of the Chesapeake just referred to connects with the line of the carriers at Elkhorn City. The distance between McRoberts and the terminus of the Sandy Valley & Elkhorn Railway is about 3 miles.

The applicants and the carriers have entered into a tentative agreement providing for the proposed acquisition of control and assumption of obligation, if approved by us, by the execution of a lease, a copy of which was filed with the application. Under the lease all the property, rights, and franchises (except the franchise to be a corporation) of the carriers are demised to the applicants, jointly, for a period of 999 years from May 11, 1923, upon substantially the following terms:

Prior to the execution of the lease the capitalization of the Clinchfield is to be reduced by proper legal action to $53,292,000, consisting of first-mortgage 5 per cent 30-year gold bonds, due June 1, 1938, in the amount of $13,950,000, first and consolidated mortgage 30-year 6 per cent gold bonds, series A, due December 15, 1952, in the amount of $8,000,000, Lick Creek & Lake Erie Railroad first-mortgage 5 per cent gold bonds due January 1, 1933, in the amount of $195,000, equipment-trust notes and obligations in the amount of $6,147,000, and common capital stock of the par value of $25,000,000; as rental for the leased properties the lessees are to pay $750,000 per annum for three years beginning January 1, 1925, $1,000,000 for 10 years beginning Jannary 1, 1928, and $1,250,000 per annum for

the remainder of the term, being 3, 4, and 5 per cent, respectively, on the $25,000,000 of common capital stock; in addition, the lessees are to pay the interest on the bonds and equipment-trust obligations, including such obligations as shall be issued by the Clinchfield in connection with the payment for certain locomotives now under construction, and on such other securities as may hereafter be issued under the terms of the lease; the lessees are also to pay the interest on $1,500,000 of Holston Corporation 5 per cent realty and collateral-trust convertible notes, due April 1, 1926, guaranteed as to payment of principal and interest by the Clinchfield, if, and to the extent that, the [fol. 87] latter is required to pay such interest; they are also to pay all taxes, assessments, and other governmental charges upon the leased properties, and certain other customary charges; money in possession of the lessors on May 11, 1923, and net income from the leased properties from said date to date of delivery of possession of the properties, are to be applied by the lessors or the lessees in making additions and betterments, or otherwise as provided in the lease; the lessees may make additions and betterments and extensions and improvements to the leased properties, and for expenditures made therefor shall be entitled to be reimbursed by the Clinchfield with its stock or bonds or both as the lessees shall specify, such securities to be taken by the latter at fair and reasonable market prices in view of market conditions and other circumstances existing at the time; and in like manner the lessees are to be reimbursed for all payments, costs, and expenditures incurred in taking up maturing obligations of the Clinchfield.

It appears that the primary object of the L. & N. in acquiring control of the Clinchfield, and making the proposed connection, is to relieve an intolerable car-supply condition said to exist on its Lexington & Eastern line to McRoberts, and on its Cumberland Valley line in southeastern Kentucky. The first of these lines, which will hereafter be designated herein as the McRoberts line, extends from a connection at Winchester, Ky., with the main line of the L. & N. running from Corbin to Cincinnati, southeasterly into what is known as the Hazard coal field. The Cumberland Valley division of the L. & N. passes through what is known as the southern Appalachian coal field. A

branch of this line extends northeasterly into what are known as the Harlan and Benham fields. These fields are designated collectively as the southeastern Kentucky coal field.

The Hazard coal field lies within the basin of the headwaters of the Kentucky River and its tributaries. The testimony is that there are several hundred thousand acres in this field; that it was opened in 1913; that there are now in the field 127 operators, who have expended more than $40,000,000 in developing the territory; that their mines have a car-rating capacity of 1,300 cars per day; and that they are shipping 800 cars per day, all that the L. & N. is able to furnish. The southeastern Kentucky coal field is within the basin formed by the headwaters of the Cumberland River and its tributaries. From the record it appears that there are from 150,000 to 200,000 acres of coal-bearing lands in Harlan County alone, and about 100,000 acres in Bell County; that in Harlan County there are about 45 independent concerns in the operators' association conducting about 60 separate operations, with an investment of between $40,000,000 and $50,000,000; that, in addition, there are several independent operators; that at [fol. 88] present coal shipments from the Harlan County field amount to about 8,000,000 tons per year; and that the field has a potential capacity of between 15,000,000 and 16,000,000 tons per year. The entire development in this field has taken place since 1908.

The principal market for the coal mined in eastern and southeastern Kentucky is north and west of the Ohio River. A part of the coal from the Harlan field moves to points in Kentucky and to the Southeast as far south as Georgia and Florida, and east into the Carolinas. Between 58 and 60 per cent of it moves to points beyond the Ohio River. No coal from the Hazard field is shipped into the Southeast. About 65 per cent of it is destined to points in the North and Northwest.

In marketing the coal in territory north of the Ohio River, the L. & N. is compelled to send its cars over the lines of its connections. The testimony is that these cars are not returned promptly and that, although the L. & N. has an ample supply of coal cars, there are often times of serious shortage, due to failure of its connections to return them;

and that, in addition, there is often congestion at the Ohio River gateways. It is represented that this imposes a serious handicap on the proper marketing, and consequently upon the proper production of coal in these fields. To remedy this situation the L. & N. has been and is now making extensive improvements and additions and betterments. Since the termination of Federal control it has expended a large amount for additional equipment and in double tracking for the sole purpose of improving its coal transporting facilities. While it is intended that these improvements shall lessen, to some extent, the restriction under which the mines are now operating, and improve the operating condition on the lines of the L. & N., it is represented that permanent relief can be obtained only by securing another outlet from each of the two fields. This the L. & N. proposes to do, in the event the lease is approved, by constructing the proposed links between its McRoberts and Harlan County lines on the one hand and the Clinchfield on the other.

It is expected that when the proposed links are completed, coal from the eastern and southeastern Kentucky fields will find a market in the Southeast; that this will result in cars passing both ways, thus better balancing movement; and that cars going to the south will be returned much more promptly than those going north for the reason that there would be less likelihood of the L. & N. cars being misused in the Southeast, there being no coal mines in that territory, and it being to the interest of the Clinchfield and the Coast Line to expedite the return of empties. It is also expected that the links, or at least one of them, will afford a new merchandise route between south- [fol. 89] eastern territory on the one hand, and points in Kentucky and beyond the Ohio River to the north and west on the other.

No definite surveys covering the proposed connections between the L. & N. and the Clinchfield have been made. The plan is to build an extension of the McRoberts line through the mountains to Elkhorn City, and to connect the Harlan County branch from a point somewhere near its eastern terminus with the Clinchfield either directly or in combination with some of the existing lines on the Virginia side of the mountains. One plan is to build a connection across to the Cumberland Valley line, somewhere west of

Norton, and to extend that line to a connection with the Clinchfield, or secure trackage rights over some one of the lines now connecting the Cumberland Valley line with the Clinchfield. The only projections that have been made, however, covering the Harlan County connection, are reconnaissance surveys and tests from contour maps. The testimony is that there are 18 feasible routes or combinations of routes, the shortest of which would require construc-ing about 5.75 miles of railroad. The shortest feasible route from the eastern terminus of the Harlan County branch to the Clinchfield is said to be about 38 miles.

In support of the application it is claimed that numerous benefits will accrue to the three systems involved and to the territory and industries they serve. The interveners who are in favor of the lease expect practically the same benefits to result from its approval. Most of them expect some special advantage to their particular business, organization, or community. While generally conceding that the proposed connections between the L. & N. and the Clinchfield would be in the public interest, the interveners opposing the lease contend that it would not be in the interest of the public for the applicants to be in complete control of the line of the carriers. For the most part they are fearful that approval of the lease will be injurious to their particular business, organization, or community.

Under the provisions of paragraph (2) of section 5 we are given broad powers to consider questions of public interest involved in the acquisition of control by one carrier of another, and are given authority by order to approve and authorize such acquisition under such rules and regulations and for such consideration and on such terms and conditions as shall be found by us to be just and reasonable in the premises. Carriers affected by any order made by us, pursuant to paragraph (2) are, under the provisions of paragraph (8) of the section, relieved from the operation of antitrust laws, and of other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by [fol. 90] such order. The relief is not granted for the benefit of any railroad, particular industry, or community, and the benefits to be derived or the injury which may be suffered by any railroad, industry, or community be-

cause of the proposed transaction, may be considered only in so far as it relates to the general public interest. The primary consideration in all such cases arising under paragraph (2) must be whether the proposed acquisition of control is in the public interest. The public interest, however, is the aggregate of many individual and community interests, and where there is conflict as to the results which would follow the approval of a proposed transaction, it becomes necessary to examine the claims of the conflicting interests in order to determine the ultimate public interest.

As to the terms and conditions of the proposed lease, the rent to be paid by the applicants is based on a capitalization of $54,792,000, including the $1,500,000 of Holston Corporation notes, guaranteed by the Clinchfield. The applicants represent, and the testimony of witnesses familiar with the property of the carriers is, that it is worth at least $55,000,000. Our tentative valuation of the properties pursuant to section 19a of the act has not yet been completed. The Clinchfield's consolidated general balance sheet as of April 30, 1923, shows capital stock issued and outstanding $36,500,000; funded debt including equipment obligations, $33,292,000; investment in road, $52,947,805; investment in equipment, $15,046,317; accrued depreciation on equipment, $2,319,534; current assets, $3,829,820; current liabilities, $1,638,827; and corporate surplus, $4,386,451. It will be noted that the rental to be paid is not based on the outstanding securities. These are to be reduced by $16,500,000, the reduction to be effected by retiring $5,000,000, principal amount of 15-year 6 per cent cumulative income debentures and $11,500,000, par value, of 6 per cent noncumulative preferred stock. For the purposes of this proceeding we may accept the capitalization of the carriers, as reduced, as fairly representative of the value of the properties to be leased. The rent to be paid, based on this capitalization, and the terms and conditions of the lease appear to be just and reasonable.

The position of the applicants as to public interest involved in the proposed acquisition of control, is, briefly stated, that it will open up the Kentucky coal fields to the Carolinas and the South Atlantic ports; will afford a new and competitive merchandise route between the Northwest and the Southeast; and will benefit the three systems with

resultant benefits to the industries and the territory they serve. Their chief reliance is on the first two propositions. Before considering these we shall dispose of the third, namely, that the proposed lease will be in the public interest [fol. 91] in that it will benefit the three systems and the territory and industries they serve. Both applicants expect to benefit by the addition to their system of 287 miles of what they hope will prove a remunerative line. In addition, the L. & N. expects to find relief in the matter of its car service to the eastern and southeastern Kentucky coal fields, and the Coast Line, which has no coal on its own rails, expects to benefit by having access over the controlled lines of the carriers to the Kentucky and southwestern Virginia coal fields. It is argued that the lease will benefit the Clinchfield in that it will insure the immediate and future development of its properties and enable its owners to derive some profit from their investment. In addition to the benefits which are expected to accrue to the public in general by reason of opening up the Kentucky coal fields to the markets in the Carolinas and the Southeastern States, and by reason of the creation of a new through route between the Southeast and the Northwest, particular benefits are expected to accrue to the Kentucky coal operators in opening up for them a market in the Southeast; to the Clinchfield territory by making possible its development, removing its industries from a position of semi-isolation, and by giving its coal operators a route to the northern markets; and to the industries in the territory reached by the Coast Line by giving them trunk-line service and access over one system to sources of coal supply.

Relieving a serious car-service condition would be in the public interest. The testimony on behalf of the Kentucky coal operators is that they do not intend to relinquish any of their northern and western markets or to relax their efforts to ship all the coal they can in that direction. On behalf of the Clinchfield operators the testimony is that Clinchfield coal now competes with Kentucky coal in the North, and that the building of the proposed connection would not restrict their market but would open new markets for them to the north and west. Use of the proposed connections by the Clinchfield operators would necessarily result in more cars moving to the north if additional markets

for coal could be found in that direction, and if additional cars should be furnished. It is hardly to be expected, however, that coal from the Clinchfield territory will move to the northwest in any considerable quantities. The normal market for this coal is in the Southeast. Nor is it to be expected that there will be any great movement of coal from the Hazard territory into the Southeast. The normal market for this coal is in the Northwest. There should be considerable movement from the Harlan and Benham fields into the Southeastern States. This should result in a better balancing of the empties and in more efficient car service.

[fol. 92] The benefit to be derived by the Kentucky coal operators and the Clinchfield operators would depend, of course, on their ability to find additional markets, and the testimony is that at present there is overdevelopment in both fields and a shortage of markets in the territory reached by the Clinchfield operators. The benefit to the Coast Line and its territory and industries, by reason of having a one-line haul from the coal mines, and the possible benefits to the Hazard operators by reason of an additional outlet to the southeast will be hereinafter discussed.

It is claimed that the extension and improvement of the Clinchfield will be assured by placing it under control of carriers whose interest will be to develop it, and whose financial strength is such that this development can be financed at all times and on reasonable terms. So far as appears, the Clinchfield has in the past experienced no difficulties in financing its capital expenditures or in expanding its property to meet the constantly growing demands upon it. Moreover, it appears that most of the improvements to be made in the immediate future, in the event the lease is approved, are to be paid for out of the current funds and earnings of the Clinchfield. As to the development of the latent possibilities of the Clinchfield territory, the record contains no evidence that any Clinchfield territory has suffered because of inadequate transportation service, lack of markets, or injurious rates.

There is much testimony as to the need of coal in the Southeast, and particularly as to the need of Kentucky coal in the Carolinas. The following statement from a report of the United States Geological Survey shows the resources

of coal supply for the Southeastern States in 1918 and the quantities in tons received by each State from each source:

Coal field	North Carolina Tons	South Carolina Tons	Georgia Tons	Florida Tons
Alabama	.....	.....	556,585	173,290
Northeastern Kentucky	13,715	17,420	4,680	7,405
Hazard district	.....	.....	.....	.....
Southeastern Kentucky	144,885	293,800	1,294,245	54,080
Tennessee	259,016	135,200	745,906	17,810
New River	478,150	215,455	2,275	.....
Pocahontas and Tug River	420,225	113,750	.....	.....
Southwestern Virginia	899,339	754,291	277,910	80,292
Kanawha and Kenova-Thacker districts	377,715	66,557	.....	.....
Total	2,593,045	1,596,473	2,881,601	332,877

This statement does not show fuel coal delivered to railroads by all-rail routes. In addition to commercial coal it appears that large quantities of coal are used by the carriers in this territory. It appears that at present the annual fuel [fol. 93] consumption of the Coast Line and the Seaboard is about 1,500,000 tons and 1,400,000 tons, respectively. In addition, the Southern and the smaller carriers of the Southeast use enormous quantities of coal.

It will be noted that over one-third of the coal shipped into North Carolina and nearly one-half of that shipped into South Carolina moves from southwestern Virginia. The mines of the Clinchfield Coal Corporation are located in that territory. The testimony is that this company owns about 300,000 acres of coal land in southwestern Virginia; that it produces about 2,500,000 tons per year; that its mines have a capacity of about 3,000,000 tons a year, and that the field is susceptible of unlimited development. Furthermore, the record shows that there is no shortage of coal in the Southeastern States and that there is no danger of lack of coal, so far as development is concerned, either in the main Virginia fields, as distinguished from the southwestern Virginia fields, or in the West Virginia fields.

The testimony is that the coal produced in eastern and southeastern Kentucky is of superior quality for by-product, gas-making, and metallurgical work. It is represented that there is a demand for coal in the Southeast for these purposes. The testimony as to this demand, however, is very general and can be given very little weight. It appears that coal of practically the same quality is mined in

southeastern Virginia and to the east of the mountains separating the Hazard field from the Big Sandy territory. The evidence is that, so far as southeastern Atlantic ports are concerned, the business of exporting coal is practically dead, and that there is little hope of its being revived until the credit of foreign countries is restored.

While there is apparently no immediate need for additional sources of coal for the Carolinas, there is evidence of considerable demand for Kentucky coal in the Carolinas, and that access to additional reservoirs for fuel supply would be welcomed in the Southeast even by those who are opposing the granting of this application. It is asserted that the demand for Kentucky coal will increase, and there is considerable evidence in support of this assertion. The testimony is that the mines in eastern Tennessee are becoming exhausted and that local demand for Alabama coal is gradually withdrawing that coal from the markets of the Southeastern States. Statistics showing increase in population, number of manufacturing establishments, persons employed, primary horsepower, and capital were submitted as evidence that the Carolinas and other Southeastern States are growing rapidly and undergoing a remarkable industrial development. Especially marked is the growth in the cotton-manufacturing industry, which has in the past been largely dependent upon the development of hydroelectric power. The testimony is that future development [fol. 94] will require more and more the use of coal as a primary source of power.

Considering the development of the Carolinas and the probable continuance of this development, the day is doubtless not far distant when it will be very much in the interest of the entire Southeast to have available the sources of fuel in southeastern Kentucky. The record shows that there have been times in the past when, because of inadequate car service or strikes, industries in the Carolinas have been unable to secure coal in the quantities desired. It is obvious that situations might arise from strikes or other causes where the present sources of coal supply for the Southeastern States might be closed to them. On such occasions it would be very desirable and much in the interest of the section concerned to have access to the vast reservoirs of

eastern Kentucky coal. Moreover, the public should benefit by the added competition.

We do not regard as unwarranted the position of the L. & N. that without an interest in the profits which it hopes to derive from its interest in the lease, it would not be to its interest to build the proposed connections for the short hauls it would receive on coal moving over these connections to the Southeast. The opening of the southeastern Kentucky coal fields, however, is not dependent upon the approval of the proposed lease or on the building of the connections by the L. & N. There is now pending before us in Finance Docket No. 2806 an application of the Southeastern for a certificate of public convenience and necessity to construct a line of railroad about 12 miles in length from a connection with the Virginia & Southwestern Railway to a connection with the Harlan County branch of the L. & N. So far as appears, it is the intention of the Southeastern to begin immediate construction of this line if it is granted a certificate of public convenience and necessity. Its financial arrangements have not yet been completed; but there is evidence that it will receive the support of certain coal operators in southeastern Kentucky, who have entered into contracts with the promoters of the Southeastern to pay them a bonus of 5 cents a ton on all coal shipped over the proposed line until they have paid the promoters an aggregate of $6,000,000. There would be certain advantages in having the L. & N. build such a line, chief of which would be the one-system haul into the Carolinas and the possible use of the line as a link in a new through competitive merchandise route.

The testimony is that connection via McRoberts and Elkhorn with the Clinchfield would be feasible as a merchandise route only for the section of Kentucky east of the applicants' main line from Cincinnati to Corbin. Practically all the coal that is now mined on the east side of the mountain which [fol. 95] separates the Hazard field from the Big Sandy territory is marketed in the North and Northwest. Very little, if any, goes into the Southeast. The testimony is that it does not move into the Southeast for the reason that virtually all of it is being mined by one company, the Consolidated Coal Company, which markets it in big contracts, and for the further reason that the coal must now pass over

two railroads before reaching the Clinchfield. Should the McRoberts connection be made, coal from the Hazard field, in order to reach the Southeast, would have to move about 60 miles farther than coal from the operations along the Clinchfield, through which the Hazard coal would have to pass on its way to the southeastern markets, and about 36 miles farther than coal from the Benham field in southeastern Kentucky after the proposed connection is made between the Clinchfield and the Harlan County branch. The facts of record are not convincing as to the benefits which are expected to be derived from the McRoberts connection.

The major public interest involved in the proposed acquisition and control of the Clinchfield lies in its utilization as a link in a new through route between the Southeast and the Northwest. The strategic location of the Clinchfield, both in its relation to the southeastern territory and the coal supplies of the Southern States, is described in the report on consolidation of railways made to us by William Z. Ripley, and appearing on pages 550-554 in Consolidation of Railroads, 63 I. C. C. 455.

The territory along the Clinchfield is rich in natural resources, chief of which is coal. It appears that the Clinchfield was constructed primarily to develop the resources of this territory, and especially to afford transportation for coal. The construction is of the most modern type, with easy grades which fit it for transportation of large units of freight at low cost. Its chief source of traffic is coal, which comprises about 70 per cent of its tonnage. The development of the Clinchfield has been principally as an originating line. During the years 1915-1922, inclusive, and for the first eight months of 1923, it handled a total of 1,126,161 carloads of revenue freight, of which 611,735 originated on its own lines and 514,426 were received from connections. Tonnage received from connections during the period given was distributed as follows: Southern 40.15 per cent, Norfolk & Western 24.43 per cent, Chesapeake 18.95 per cent, Western Carolina 5.42 per cent, Seaboard 1.63 per cent, Piedmont 0.30 per cent, others 9.12 per cent. For the same period percentages of tonnage delivered to connections were: Southern 49.22 per cent, Western Carolina 19.87 per cent, Seaboard 11.05 per cent, Chesapeake 7.25 per cent,

Norfolk & Western 7.05 per cent, Piedmont 3.44 per cent, others 2.12 per cent.

[fol. 96] The Clinchfield has established in connection with the Chesapeake and other connecting lines numerous through routes and joint rates between the Southeast and the central West. With the exception, however, of coal received from the Southern and the Norfolk & Western, very little of the Clinchfield's traffic received from connections is for destinations beyond its own line, its connections preferring their longer hauls via other routes. The Seaboard, the Coast Line, the Norfolk & Western, and the Chesapeake prefer their central and eastern Virginia gateways for traffic between the Southeast and the Northwest, and the L. & N. prefers its own line for traffic between the Northwest and points south of Atlanta and the Savannah River, and the line of the Southern, through its connection at Jellico, Tenn., for traffic destined to the Carolinas. As the result of this policy, most of the traffic that the Clinchfield receives from its connections is for points local to the Clinchfield, and very little use is made of the line as a link in through routes.

No specific evidence as to the feasibility of the proposed through route was offered. Consideration of the connection via McRoberts as a link in such route, except for certain territory in eastern Kentucky, may be eliminated; and no definite plans as to the proposed connection between the Harlan County branch and the Clinchfield are before us. Data as to grades and other physical characteristics of the Harlan County line and the proposed connection have not been furnished. Witnesses for the applicants testified, however, that the proposed route is a feasible one and that operating conditions would be as easy over this route as oevr the Southern's route between Cincinnati and the Carolinas via Paint Rock. The applicants have evidenced an intention of making the connection between the Clinchfield and the Harlan County line and of utilizing the Clinchfield as a link in a new through route connecting the Southeast and the Northwest. Unless the connection were made, the lessees could hardly realize the principal benefits which they represent are expected to accrue from the lease. They would hardly enter upon such an enterprise without reasonable assurance of its success.

The chief purpose of the L. & N. in establishing the proposed new merchandise route is to get into the western Carolinas in competition with the Southern, which is said to occupy the most productive portion of that territory. The Southern has two routes from the central West through the Louisville and Cincinnati gateways into the Carolinas, one via Chattanooga, Tenn., and Atlanta, Ga., and the other via Knoxville, Tenn., Paint Rock, at the Tennessee-North Carolina boundary, and Asheville, N. C. The latter is the shortest route into the Carolinas from Cincinnati. The route via the Chesapeake from Cincinnati to Ashland, Ky., thence [fol. 97] southward to Elkhorn City and over the Clinchfield into the Carolinas is the shortest route into the Carolinas from territory north of Ashland. It is slightly longer to Bostic and Marion, N. C., and about 48 miles longer to Spartanburg than the Southern's route. The Elkhorn City route is open for traffic between Louisville and the Carolinas, and between Cincinnati and the Carolinas. The testimony is that the L. & N., to reach Carolina territory, finds its most feasible route via Jellico in connection with the Southern, which is its main competitor. It appears that the L. & N. has never been very active in soliciting Carolina traffic via any routes because those by way of its Atlanta gateway to an important portion of the Carolina territory are circuitous, and because the revenue feature has never been satisfactory from the L. & N. standpoint. It is expected that the opening of the proposed route will change this situation, giving the L. & N. a greater revenue interest in addition to placing it in a physical position to compete actively with the Southern in Carolina territory.

While admitting that the proposed route, if feasible, would increase competition as to certain territory between the L. & N. and Southern, those opposing the lease contend that its approval would destroy certain existing and potential routes, withdraw effective competition as to large areas reached by the Coast Line, and give the Coast Line an undue advantage in transportation in the Southeast. The record shows that the applicants now have under their exclusive control three separate routes from Ohio River crossings into the southeastern territory as follows: (1) Via Louisville, Nashville, Birmingham, Ala., Montgomery, Ala., and Waycross, Ga.; (2) via Louisville, Nashville, Chattanooga, At-

lanta, Augusta, Ga., and Yemassee, S. C.; (3) via Knoxville, Atlanta, Augusta, and Yemassee. In addition to these exclusively owned or controlled routes, the Coast Line has another route into the Carolinas and the southeastern territory from the Ohio River crossings via the Norfolk & Western through Roanoke, Va., to Winston-Salem, N. C., thence over the Winston-Salem Southbound Railway to Wadesboro, N. C. The Coast Line has another route to the Ohio River crossings via the Richmond-Norfolk gateways.

The evidence is that some of the routes just described are competitive as to existing routes via the Clinchfield and the Chesapeake and the Norfolk & Western on the north, and other connections of the Clinchfield on the south; that the route via Elkhorn City is a feasible route for through traffic; that it has been used by the Seaboard in competition with the L. & N. in two or three instances; and that it has also been used by other carries in competition with the Coast Line. It also appears that the proposed route via the Har- [fol. 98] lan County branch would be competitive with the existing route via Elkhorn City for traffic between Cincinnati and the Southeast. It is not the intention of the L. & N. to use the Clinchfield route for traffic between the Northwest and points south of a line following the Savannah river and across to Atlanta. It would use its present route via Atlanta for such traffic. Distances from Cincinnati to points in the territory south of the Savannah River-Atlanta line, via the proposed route are about 21 miles greater than via the Atlanta route. Nor is it the intention of the L. & N. to compete for traffic via the proposed route to and from territory north of the Ohio River, east of a line from Cincinnati to Benton Harbor, Mich. The intentions of the Coast Line as to this territory are not disclosed, but the evidence is that the distances via the Clinchfield from Cincinnati to points in the Coast Line's North Carolina territory and in substantial portions of its South Carolina territory are greater than distances via the Winston-Salem route. The Coast Line would doubtless prefer its existing route via Winston-Salem as to traffic between Cincinnati and points in the territories last designated. In so far as the applicants prefer their own existing and potential routes for movement of traffic between points north of the Ohio River and

points in the Southeast, now competitive with existing routes via Elkhorn City, there would be a diminution of the use of the Clinchfield as a link in through routes, unless it remains open to the applicant's competitors. Moreover, the use of the Elkhorn City line as a link in potential routes would in no wise be improved by approval of the lease since its use would depend upon the cooperation of the Chesapeake, which would doubtless continue to prefer its longer hauls via eastern Virginia gateways.

The record shows that there are considerable areas in southeastern territory competitive only as between the Coast Line and the Seaboard. It is the established policy of both the Coast Line and the Seaboard to localize their competitive traffic as to all points on owned or controlled lines. It appears that the Coast Line intends to extend this policy to traffic moving via the Clinchfield, to and from competitive points, unless the Coast Line routes are too circuitous. The applicants represent that as to points competitive between the Seaboard and Southern via the proposed new route it would naturally be the policy of the L. & N. to prefer the Seaboard. As an evidence of the independence with which the L. & N. acts in routing its traffic, it is pointed out that its interchange with the Seaboard now exceeds its interchange with the Coast Line. It is claimed that any loss in traffic that the Seaboard might suffer at points competitive with the Coast Line, or because of diversion of traffic from the Virginia gateways, would be more than offset by gains [fol. 99] in traffic handled in connection with the L. & N. and Clinchfield in competition with the Southern, and in additional traffic to and from the Southeast because of the impetus which the new route is expected to give to the development of the territory. There are no data in the record which would enable us to measure the losses or the gains that the approval of the lease would cause the Seaboard. The record indicates, however, that as to certain territory the Seaboard would necessarily lose some traffic and that competition as to such territory would be diminished.

The applicants argue that any losses in competitive traffic by the Seaboard would be a private loss which would not result in any injury to the public. Loss of competitive service to the territory reached by the Seaboard would hardly

be in the interest of such territory. The relation of the Seaboard's loss of revenue to the public interest would depend, of course, upon the extent of the loss. Diminution to a point where it could not earn its fixed charges, or even to a point where its credit would be impaired, would certainly not be in the public interest.

The Seaboard is vitally concerned in the Clinchfield, not only as a link in competitive routes but as an avenue to sources of coal supply both for itself and for the territory and industries it serves. One of the reasons urged in support of the application is that the Coast Line has no coal on its lines and that approval of the lease will be in the public interest in that it will give the Coast Line and its industries direct access to sources of fuel supply. The testimony is that the Coast Line has been at a decided disadvantage as compared with the Southern because of this lack of coal, and that it is largely due to this factor that its territory has not developed industrially. The situation of the Coast Line and the Seaboard are practically the same with reference to needs for fuel coal. Their present annual consumption is given above. Each carrier receives about 25 per cent of its fuel coal from the Clinchfield mines. The record indicates that industrial development on the Seaboard, at least in cotton mills, fertilizer factories, and cement plants, exceeds the development on the Coast Line. The latter now reaches via its controlled rails the Hazard and Harlan fields, the Appalachian fields of Virginia, the Coal Creek, Jellico, and Bon Air fields of Tennessee, and the Alabama field. Its access to these fields is of course by circuitous routes. Approval of the lease would admit it to the Clinchfield mines and would leave the Seaboard entirely dependent upon its competitors for a large amount of its fuel coal. Many of the industries in the Seaboard's territory would also be dependent upon its competitors for their fuel.

[fol. 100] The record discloses little need in so far as the Coast Line is concerned of improving its competitive position either by the addition of through routes or more direct avenues to sources of fuel supply. It appears that the rails of the Coast Line - L. & N. system extend fairly well over the entire South and, except in Mississippi, a part of western North Carolina, and parts of Georgia, reach sections of the South which one or more of the other systems

serving the South fail to reach; that its rails traverse the South to a much greater extent than the rails of any other system, including the Illinois Central - Central of Georgia system; and that the only ports between Norfork and New Orleans not reached by its lines are the unimportant ports of Georgetown, S. C., and Fernandina, Fla. The chief need of the system is said to be a line from Atlanta in a southeasterly direction to a connection with its lines in southern Georgia and Florida.

Because of its isolation and the policy of its connections in preferring the longer hauls by more circuitous routes, the Clinchfield is not rendering the service for which it was designed and of which it is capable. The testimony is that its influence on the rate structures of the Carolinas, where its maximum influence should be felt, is practically nothing, and that so long as it continues as an independent property its usefulness to the public will be circumscribed. Control of the Clinchfield by the applicants, when the proposed connections are made between the L. & N. and the Clinchfield, especially the connection with the Harlan County branch, should result in added competition among the coal operators serving the Carolina markets; should give the Carolina territory an additional source of fuel in times of emergency; and should result in added competition with the Southern for traffic between the Carolina territory and the Northwest, at least between the western portion of the Carolinas on the one hand, and Kentucky and points beyond the Ohio River, west of the Cincinnati-Benton Harbor line, on the other. Without some provision, however, for its use by other carriers as a link in through routes, control of the Clinchfield by the applicants would probably result in the abandonment of existing routes, especially the one via Elkhorn City and the Chesapeake; and would doubtless result in placing the Seaboard and other carriers of the Southeast at a disadvantage as compared with the Southern and Coast Line in competing for traffic between the Northwest and certain sections of the Southeast; although as to other sections of the Southeast it might improve the competitive position of the Seaboard. One of the purposes of the transportation act, under the provisions of which the applicants are seeking to acquire control of the Clinchfield, is to foster the weaker carriers. The Seaboard is the weakest of the four great

[fol. 101] systems serving the Southeast. Its independence and the support of its competitive position constitute an important factor in the public interest in transportation in that territory.

Those opposing the lease urge that the interest of each of the interveners and of the public in general will be best served if the Clinchfield is maintained as an independent line supported by its connections at each end. They request that any approval of the proposed acquisition be under condition that the Clinchfield be maintained as an open route, neutral or impartial, and equally available to all connections. They generally urge that unconditional approval of the application be refused. The position of the Seaboard is that the public interest will be best served by placing the Clinchfield in a position similar to that of the Richmond, Fredericksburg & Potomac Railroad, that is, in control of its immediate existing and potential connections at each end in a way that will fairly protect the interests of each. The Seaboard proposes, in the event the application is denied, to submit a plan for such joint control of the Clinchfield. It argues that the question before us is the broadest interest in transportation, not for to-day, but over an unlimited future; and that disposition of the Clinchfield which does not best serve the public interest is contrary to the public interest. Under the provisions of paragraph (2) of section 5 we are not in a position to consider whether acquisition of control in some other manner than that proposed, or by some other carrier than the applicant, would better serve the public interest. The question which we must determine in that regard is whether the acquisition of control proposed is in the public interest.

On February 9, 1924, before arriving at any conclusion, we sent a memorandum to persons who had intervened or filed appearances in the proceeding, requesting that expressions be made regarding the arrangement to be sanctioned and required in case the decision of the commission should be favorable to the applicants' proposal, and asking for specific consideration of the effect of an order of approval made subject to certain conditions, set forth in the memorandum. The applicants and a number of others to whom the memorandum was addressed have filed representations in regard to the conditions suggested. On con-

sideration of these conditions in connection with the representations filed, we have reached the conclusion that approval and authorization of the acquisition proposed will be in the public interest only upon the following conditions:

1. The applicants shall establish and maintain a separate organization for the combined properties of the Carolina, Clinchfield & Ohio Railway and its subsidiaries, so that the three companies shall constitute a separate oper-[fol. 102] ating unit, having a responsible management directly in charge of the operations of such properties.

2. The Louisville & Nashville Railroad Company shall, within 12 months after the effective date hereof, file with the commission its application under paragraph (18) of section 1 of the interstate commerce act for a certificate of public convenience and necessity to construct the proposed connections between its McRoberts line and its Harlan County branch on the one hand, and the Clinchfield on the other, and, in the event it proposes to acquire existing lines for use as part of such connections, under such other provisions of the act as are pertinent; and shall, if in such proceeding it is found that the present or future public convenience and necessity require or will require the construction of either or both such connections, proceed with such construction in accordance with the terms of the certificate issued in such proceeding.

3. So far as lies within the power of the applicants, existing routes and channels of trade and commerce heretofore established by other carriers in connection with the Clinchfield shall be preserved, existing gateways for the interchange of traffic with such other carriers shall be maintained, and the present neutrality of handling traffic inbound and outbound by the Carolina, Clinchfield & Ohio Railway and its subsidiary, the Carolina, Clinchfield & Ohio Railway of South Carolina, shall be continued so as to permit equal opportunity for service and routing or movement of traffic which is competitive with traffic of the applicants, or either of them, to and from all connecting lines reached by the line of the Clinchfield companies, without discrimination in service against such competitive traffic.

4. The applicants shall permit the line of the Clinch-

field and its subsidiaries to be used as a link for through traffic, via existing gateways of interchange, or via such gateways as may hereafter be established under authority of the commission by means of the connecting lines which the Louisville & Nashville Railroad Company proposes to build, equally available to such other carriers, now connecting, or which may hereafter connect, with the line of the Clinchfield and its subsidiaries, as may desire to participate in through routes and joint rates between points in territory north and west of the line of the Clinchfield and points at and beyond the Ohio River on the one hand and points in the southeastern and Carolina territory on the other, under divisions to be agreed upon by the applicants, or either of them, and/or the Clinchfield organization, on the one hand, and by the other participating carrier or carriers on the other, and shall not discriminate as to rates, fares, and charges against such participating carrier or carriers as compared with the applicants, or either of them; the intention of this provision being that [fol. 103] the line of the Clinchfield and its subsidiaries shall be maintained as an open route equally available to all carriers connecting with the Clinchfield for traffic between the points designated.

5. It shall be expressly provided by the lease, as executed, that no securities shall be issued by the lessors, or any of them, except with our approval where such approval is required under the provisions of section 20a of the interstate commerce act; and that the par value of stock and/or the principal amount of bonds or other securities issued to refund maturing obligations or to reimburse the lessees for expenditures made as provided in the lease, shall not on the one hand exceed the principal amount of the securities refunded, and on the other, the amount of actual expenditures for additions, betterments, extensions, or improvements properly chargeable under our accounting classification to capital accounts.

The applicants have protested vigorously against the imposition of conditions 3 and 4. We have considered fully their representations, however, and have reached the conclusion that without the observance of these conditions by the applicants we are unable to find that the proposed acquisition of control would be in the public interest.

On behalf of the Seaboard it is argued that we must, as a matter of law, dismiss the application if any one of three legal propositions which that road supports is correct. These are that paragraph (2) of section 5 does not authorize joint acquisition of control; that the material terms of the proposed lease are in conflict with section 20a; and that the lease of the property of the Carolina company to the applicants is in violation of a provision of the constitution of South Carolina to the effect that no foreign corporation or association shall lease or operate any railway in that State or purchase the same or any interest therein. We are of the opinion that under the provisions of paragraph (2) we have authority to authorize two or more carriers to acquire joint control of another carrier. It is not necessary to consider the contentions as to the possible violation of the provisions of section 20a, as any uncertainty with reference to the future issue of securities by the Clinchfield, and the extent of the authority granted by our order, will be obviated by the changes to be made in the lease as provided in one of the foregoing conditions. The provisions of paragraph (8) of section 5 are deemed sufficient to relieve the applicants from the restraint imposed by the constitutional provision cited. Other representations of the interveners have been given due consideration. Our order herein will provide that it shall take effect and be in force from and after 30 days from the date hereof.

[fol. 104] Subject to the observance of the conditions given above, we find that the acquisition by the Atlantic Coast Line Railroad Company and the Louisville & Nashville Railroad Company of joint control, by lease, of the properties, rights, and franchises of the Carolina, Clinchfield & Ohio Railway as aforesaid will be in the public interest. We further find that the assumption by the applicants as joint lessees of the obligation and liability of paying as rental for said properties the progressive amounts stipulated in the lease and such further sums as may be necessary to pay the interest on the bonds, equipment notes, and other obligations of the Carolina, Clinchfield & Ohio Railway, now outstanding, including the interest on $1,500,000 of 5 per cent realty and collateral-trust convertible notes of the Holston Corporation guaranteed by said lessor, if and to the extent that the

lessor is required to pay such interest, (a) is for a lawful object within their respective corporate purposes, and compatible with the public interest, which is necessary and appropriate for and consistent with the proper performance by them of service to the public as common carriers, and which will not impair their ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose. An appropriate order will be entered.

HALL, Chairman, concurring:

The present application should either be granted or denied on its merits. The facts warrant approval of the lease without extraneous and continuing conditions. But even with those conditions I vote for it rather than to deny the application.

Commissioner Potter authorizes me to say that he joins in this concurring expression.

EASTMAN, Commissioner, dissenting:

Paragraph (2) of section 5 of the interstate commerce act, upon which the authority granted by the majority in this case is based, relates only to acquisition of control "not involving the consolidation of such carriers into a single system for ownership and operation." In my judgment the word "consolidation" is not here used in any narrow or technical sense, and the 999-year lease will effectually unite these properties into a "single system for ownership and operation." But assuming that I am in error in this opinion, certainly the union here contemplated is of so permanent and enduring a character that it ought not to be consummated until these carriers have been given the thorough consideration which the act requires in connection with the preparation and adoption of the so-called consolidation plan.

[fol. 105] Moreover, the method of accomplishing the union of these properties is open to serious objection. We have continually been warned of the danger involved in a disproportionate increase of funded debt and fixed charges, and we have also been told that it is essential that the railroads should be financed in part by the issue of new stock. A lease such as is here proposed will make not only the interest upon the Clinchfield's bonds, but also

dividends upon its stock, fixed charges of the Coast Line and the L. & N. It will accelerate the tendency toward a disproportionate increase in the fixed charges of these carriers. Doubtless they are unusually well able to stand such an increase, but the unwisdom of building up railroad systems by means of such leases has been demonstrated time and again. See the discussion of this subject in my dissenting opinion in Lease of Pan Handle by Pennsylvania R. R., 72 I. C. C. 128, 137. We ought not to encourage the practice, particularly at a time when the carriers of the country are able to finance their needs only by continual increase of debt. The permanent union of properties should be deferred until it can be accomplished by an exchange of stock which will at least not further diminish the margin of equity represented by outstanding stock issues.

CAMPBELL, Commissioner, dissenting:

I withhold my assent because it is likely that when the commission has consummated its complete plan of consolidation under the provisions of section 5 of the interstate commerce act, it will be found that the control authorized by the majority will interfere with that plan. I could go with the majority if the lease as executed were held subject to termination by order of the commission if and when found by it to interfere with the consummation of its complete plan of consolidation.

McMANAMY, Commissioner, dissenting:

Under section 5, paragraph (2), of the act, we are authorized to permit the acquisition of control of one carrier by another in any manner not involving the consolidation of such carriers into a single system for ownership and operation. Before we can legally grant such authority the law requires us to make an affirmative finding that the acquisition of control will be in the public interest. In section 5 we are also directed to prepare and adopt a plan for the consolidation of the railroads into a limited number of systems and in the division of such railways into systems we are required to preserve competition as fully as possible, and wherever practicable maintain existing routes and channels of trade and commerce. The public

policy of the transportation act also contemplates that we [fol. 106] will create and sustain competitive and evenly balanced systems. In my opinion the provisions of paragraph (2) of section 5 are related to the consolidation program and our power to authorize the acquisition of control of one carrier over another should be exercised so as not to forestall the general plan of consolidation.

In my judgment the acquisition of control under a lease for a period of 999 years in effect amounts to a consolidation of the carriers concerned into a single system. Paragraph (6a) of section 5 requires that any proposed consolidation must be in harmony with and in furtherance of the complete plan of consolidation. No complete plan of consolidation has been approved by us and therefore this control may or may not be in harmony with such plan as finally formulated. Irrespective of whether the proposed acquisition of control is tantamount to a consolidation, it not only fails to promote but is plainly contrary to the public interest.

Applicants urge that the proposed acquisition will be in the public interest when certain connections are constructed between the Clinchfield and the Louisville & Nashville so that these joint lines will form a new through route. Their principal arguments are that a new merchandise route will be opened between the Northwest and the Southeast, and that the Southeast will be benefited by having the Hazard coal mines to draw upon for its wants. There are reasons for grave doubt whether any benefits will be derived from this proposed arrangement. The evidence is not convincing that the proposed new route due to distance and congestion will be used to any substantial extent for merchandise shipments. There is now such a route in connection with the Clinchfield and the Chesapeake & Ohio, shorter than the one contemplated, which is but little used.

Respecting the new markets for coal, the report states that the present coal supply in the Southeast is adequate; that there is now an overdevelopment in the coal fields on the Clinchfield and as a result the Clinchfield is seeking markets in the Northwest; and that there is also an overdevelopment in the Kentucky fields and operators there are seeking markets in the Southeast. Can it reasonably be expected that coal from the Clinchfield territory will

pass through the Kentucky fields to the Northwest while at the same time coal from the Kentucky fields will move through the Clinchfield territory to a southeastern market? Even if this results, such cross-hauling would involve a wasteful use of transportation facilities with attendant prejudice to the public interest.

But, conceding for my purposes that certain benefits may be derived from the proposed acquisition of control, there are other elements of public interest which far outweigh the above considerations. The consolidation provisions of section 5 contemplate that the railroads shall [fol. 107] be consolidated into systems tending toward equality in earning power under competitive rates. The Atlantic Coast Line and the Louisville & Nashville are now two of the strongest systems in the South. The control granted in this case increases the predominant advantage already enjoyed by applicants, and creates a stronger system than any that now exists in the South, and is, therefore, contrary to the policy of the act. They will control the major portion of the coal supply and most of the available routes into that section. Applicants already have more routes into the South than any competitor and the control of the strategic line of the Clinchfield will restrict competition rather than preserve it. The Clinchfield occupies an indispensable relation to other southeastern carriers from the standpoint of fuel. The position of some of applicants' competitors is already one of disadvantage in their need for fuel. In addition, the Clinchfield is not a weak line but is self-supporting and is in no need of assistance.

In my opinion the free and normal flow of traffic will be fettered by reason of the control of applicants over the Clinchfield. The majority have endeavored to safeguard the maintenance of existing through routes by attaching certain conditions to the end that the Clinchfield will be maintained as an open route, equally available to all connections. The necessity for such conditions argues against the wisdom of the majority finding. There is no adequate guaranty that the conditions imposed will effectively avoid the consequences of partisan ownership. The conditions will be administered by the Coast Line and there are many ways in which the controlling road can favor its traffic.

Under such circumstances can we expect a wholehearted enforcement of the conditions? The language of the Supreme Court in the Chicago Junction case, decided March 3, 1924, with respect to the consequences of partisan control or ownership in the interchange of traffic is pertinent here. The Supreme Court said:

The order substitutes for neutral control of the terminal railroads, monopoly of control in the New York Central; and, in so doing, necessarily gives to it substantial advantage over all its competitors and subjects the latter to serious disadvantage and prejudice. The main purpose of the acquisition by the New York Central was to secure a larger share of the Chicago business. By means of the preferential position incident to the control of these terminal railroads, it planned to obtain traffic theretofore enjoyed by its competitors. Because such was the purpose of the New York Central control, and would necessarily be its effect, these plaintiffs intervened before the Commission. That their apprehensions were well founded is shown by the results. The plaintiffs are no longer permitted to compete with the New York Central on equal terms.

For the above reasons I can not assent to the approval of this lease either with the attached conditions or without them.

[fol. 108] ORDER—Entered June 3, 1924

A hearing in this proceeding and investigation of the matters and things involved herein having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the acquisition by the Atlantic Coast Line Railroad Company and the Louisville & Nashville Railroad Company of the properties, rights and franchises (except the right to be a corporation) of the Carolina, Clinchfield & Ohio Railway, and of its subsidiaries, the Carolina, Clinchfield & Ohio Railway of South Carolina and the Clinchfield Northern Railway of Kentucky, by lease, as set forth in said report, be, and the same is hereby,

authorized and approved: Provided, however, That the right of the lessees to require the lessors to issue securities in reimbursement of expenditures made by the former for additions, betterments, extensions, and improvements, and to refund securities of the lessor companies or to reimburse the lessees for refunding such securities, shall be subject to our approval where required by the provisions of section 20a of the interstate commerce act: And provided further, That the making of said lease and exercise of any of the rights conferred by this order shall in all future proceedings, judicial as well as administrative, to which the carriers above named or any of them may be parties, be deemed and taken as conclusive evidence of their acceptance of, and agreement to abide by, the conditions enumerated in said report, and numbered from 1 to 5, inclusive: And provided further, That within six months after the date hereof, and within 10 days after the execution of said lease, the applicants shall file with this commission a certified copy of said lease in the form in which it shall have been executed.

It is further ordered, That the Atlantic Coast Line Railroad Company and the Louisville & Nashville Railroad Company be, and they are hereby, authorized to assume, as joint lessees of the properties, rights, and franchises of the Carolina, Clinchfield & Ohio Railway, and its subsidiaries as aforesaid, obligation and liability of paying (1) as rental therefor in equal quarterly installments $750,000 per annum for three years beginning January 1, 1925, $1,000,000 per annum for 10 years beginning January 1, 1928, and $1,250,000 per annum from January 1, 1938, until the expiration of said lease, said rental being equivalent to dividends at 3, 4, and 5 per cent, respectively, on $25,000,000 par value, of common capital stock of the Carolina, Clinch- [fol. 109] field & Ohio Railway to be outstanding at the time the lease is executed; (2) interest on the following obligations of the Carolina, Clinchfield & Ohio Railway, now outstanding, namely, first-mortgage 5 per cent 30-year gold bonds, due June 1, 1938, in the amount of $13,950,000, first and consolidated mortgage 30-year 6 per cent gold bonds, series A, due December 15, 1952, in the amount of $8,000,000, Lick Creek & Lake Erie Railroad first-mortgage 5 per cent gold bonds, due January 1, 1923, in the amount

of $195,000, and equipment-trust notes and obligations in the amount of $6,147,000; and (3) interest on $1,500,000, face amount, of Holston Corporation 5 per cent realty and collateral-trust convertible notes, due April 1, 1926, guaranteed as to payment of principal and interest by the Carolina, Clinchfield & Ohio Railway, if, and to the extent that, the latter is required to pay such interest.

It is further ordered, That, except as herein authorized, no obligation or liability in respect of said bonds, or interest thereon, shall be assumed by the applicants, or either of them, unless and until so ordered by this commission.

It is further ordered, That the applicants, or either of them, shall report concerning the pertinent matters herein involved, in conformity with the commission's order of May 25, 1922, respecting applications filed under section 20a of the interstate commerce act.

It is further ordered, That this order shall take effect and be in force from and after 30 days from the date hereof.

And it is further ordered, That nothing herein shall be construed to imply any guaranty or obligation as to any of said securities herein enumerated, or dividends or interest thereon, on the part of the United States.

By the Commission.

(Seal.) George B. McGinty, Secretary.

[fol. 110] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER AND RULE TO SHOW CAUSE—Dec. 27, 1930

This matter comes before the Court upon the verified bill of complaint of the plaintiffs herein and an application for, among other things, an interlocutory order of injunction, and it appearing to this Court that said bill of complaint seeks an interlocutory judgment restraining the enforcement of an order of the Interstate Commerce Commission, more fully referred to and described in the said bill of complaint, such relief being sought under the Act of October 22, 1913 (28 U. S. C. A., Section 47) upon the ground of

the unconstitutionality and illegality of said order, now upon consideration of the said verified bill of complaint and application as aforesaid,

[fol. 111] It is ordered, adjudged and decreed as follows:

1st. The Honorable H. H. Watkins, Judge of the above Court, hereby calls to his assistance to hear and determine the application for an interlocutory injunction in this cause the Honorable John J. Parker, Judge of the Circuit Court of Appeals for the Fourth Circuit, and the Honorable Elliott Northcott, Judge of the Circuit Court of Appeals for the Fourth Circuit.

2nd. It is further ordered, adjudged and decreed that said defendant, as well as the Piedmont & Northern Railway Company and the Georgia & Florida Railroad Company, if they be so advised, do appear and show cause, if any it or they have, on a day hereafter to be fixed, why an interlocutory injunction should not issue as prayed for in said bill of complaint enjoining said defendant from enforcing its said order, more fully referred to and described in said bill of complaint.

3rd. It is further ordered, adjudged and decreed that the usual subpoenas do issue and be served according to law, together with a copy of the bill of complaint and of this order upon the Interstate Commerce Commission, the Honorable William D. Mitchell, the Attorney General of the United States, the Piedmont & Northern Railway Company and the Georgia & Florida Railroad Company.

H. H. Watkins, H. H. Watkins, United States District Judge for the Western District of South Carolina.

[fols. 112-115½] Subpœna and service omitted in printing.

[fol. 116] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF UNITED STATES OF AMERICA—Filed Jan. 23, 1931

United States of America, defendant, for answer to the bill of complaint filed herein against it answers and says:

I

United States admits the allegations of the opening paragraph and paragraph I of the bill of complaint.

II

For answer to paragraph II of the bill of complaint, United States admits that the suit is brought to enjoin and set aside the order of the Interstate Commerce Commission therein mentioned; admits that Exhibit 1 to the bill of complaint is a correct copy of said report and order; and admits that this Court has jurisdiction, under Urgent Deficiencies Act (38 Stat. L. 219) to hear and determine this suit. Except as so admitted, United States denies each and every allegation of said paragraph II.

III

United States admits the allegations of paragraph III with this exception:

It denies that the railroads named in said paragraph [fol. 117] have been or are now operated in conjunction and under a common management or control with the Atlantic Coast Line Railroad Company within the meaning of section 15 (4) of the Interstate Commerce Act (U. S. C. Tit. 49, sec. 15 (4)), and denies that the Interstate Commerce Commission has so found or determined.

IV

Answering paragraph IV of the bill of complaint, United States admits that the Atlantic Coast Line Railroad Company and Louisville & Nashville Railroad Company filed with the Interstate Commerce Commission the application mentioned in said paragraph for authority to acquire control by lease of the properties of the Carolina, Clinchfield & Ohio Railway and other carriers therein named; that full hearings were held and accorded by the Commission to the parties to the proceedings before it; that in the course of said proceedings the Commission suggested certain conditions to be imposed and attached to any authorization or any approval it might give to the application and that said proposed conditions were the subject

of discussion, argument, and consideration by the parties to said proceeding; that thereafter on June 3, 1924, the Commission made and entered its report and order attached to and included in the bill of complaint as Exhibit No. 4, to which the Court is respectfully referred for full information concerning the Commission's findings and conclusions and the conditions imposed by the Commission upon its authorization of the acquisition sought by said application.

[fol. 118] Except as so admitted, United States denies each and every allegation of said paragraph IV.

V, VI

United States denies the allegations contained in paragraphs V and VI of the complaint with this exception:

It admits that the Atlantic Coast Line Railroad Company and the Louisville & Nashville Railroad Company, as joint lessees, set up an operating organization known as the "Clinchfield Railroad Company" as a separate operating unit and management of the combined properties of the Carolina, Clinchfield & Ohio Railway and its subsidiaries, subsequent to and as required by the first condition imposed by the Commission upon its authorization of the lease of said railroad mentioned in said Exhibit 4.

VII

United States says that it is without sufficient knowledge or information to form a belief with respect to the allegations contained in paragraph VII of the complaint, and, therefore, as to them it neither admits nor denies; but United States respectfully refers the Court to conditions 3 and 4 mentioned in said paragraph (pp. 132-134, Exhibit 4 to complaint) for full and complete information concerning the requirements imposed by said conditions upon the operation of the leased railroad properties.

VIII

United States admits the facts set forth in paragraph VIII of the complaint, but for full and complete information concerning the authorization of the Interstate Commerce Commission issued December 23, 1926, for the con-

struction by the Georgia & Florida Railroad Company of [fol. 119] an extension to its line from Augusta, Georgia, to Greenwood, South Carolina, the Court is respectfully referred to the Commission's report and order entitled "Reorganization and Extension of Georgia & Florida Ry.," 117 I. C. C. 473, containing the Commission's statements and conclusions of fact and the authorization for the construction of the extension mentioned in said paragraph VIII.

IX

United States denies the allegations contained in paragraph IX of the complaint, except that it admits that prior to the construction of the Greenwood extension the carriers named in said paragraph IX were parties to through routes and rates for the movement of traffic southbound and northbound over the lines of the railroad companies therein mentioned.

X

United States denies the allegations contained in paragraph X of the complaint, except that it admits that prior to the completion and opening to operation of the Greenwood extension by the Georgia & Florida Railroad Company, the carriers mentioned in said paragraph filed with the Interstate Commerce Commission the tariffs and schedules mentioned in said paragraph proposing to restrict the application of existing joint rates theretofore published by the railroad companies named in paragraph IX of the complaint so as not to apply to said Greenwood extension of the Georgia & Florida Railroad Company.

XI

Answering paragraph XI of the complaint, United States admits and alleges that upon duly filed protest the Interstate Commerce Commission acting under its statutory au- [fol. 120] thority, suspended the proposed tariffs and schedules referred to in paragraphs X and XI, containing said restrictive routing provisions; that thereafter the Commission entered upon a hearing with respect to the propriety of said restrictive schedules at which all inter-

ested parties, including plaintiffs in this suit, were afforded full opportunity to present their testimony and arguments, and that, thereafter, on June 9, 1930, the Commission made and entered its report and order mentioned in said paragraph XI and attached to the complaint as Exhibit No. 1, to which the Court is respectfully referred for full and complete information concerning the findings and conclusions of the Commission in the premises. United States further admits that in said report the Commission found and held that the tariffs and schedules proposing to publish said restrictive routing provisions were not justified, and by its order required respondents thereto to cancel such schedules; and that one of the findings contained in the Commission's said report was and is that the proposed restrictive routing provisions of said tariffs and schedules "would be in violation of the conditions of the Clinchfield lease" (Exhibit 4 to the complaint).

XII, XIII, XIV, XV

United States denies the allegations contained in paragraphs XII, XIII, XIV, and XV of the complaint, except that it says that paragraph 8 of section 16 (and not section 15 as alleged in the complaint) provides a penalty of $5,000 for each day that any carrier, officer or agent thereof knowingly fails or neglects to obey any order made by the Interstate Commerce Commission under secs. 3, 13, or 15 of that Act.

[fol. 121] United States further denies that said order of June 19, 1930, violates or is contrary to the provisions of paragraph 4 of section 15 of said Act; and denies that in entering said order the Commission erroneously construed or interpreted the language and meaning of conditions 3 and 4 imposed by it upon its authorization in the Clinchfield lease case; denies that said order will result in irreparable or legal damage to the plaintiffs, or any of them; and further denies that said order will deprive plaintiffs or any of them of their property without due process of law, or will otherwise violate any of their rights under the Constitution of the United States or any amendment thereof.

Further and affirmatively answering the bill of complaint, United States alleges that by accepting and acting

upon the Commission's authorization of the Clinchfield lease (Exhibit 4), the lease applicants, who are parties plaintiff to this suit, took the same subject to all the conditions attached by the Commission to its said authorization and thereby consented to said conditions, became, were and now are bound to a strict observance thereof; that the Commission had full authority under section 5 (2) of the Interstate Commission Act to impose and attach said conditions to its authorization and approval of said lease; and that in issuing its approval of said lease the Commission found and held that said lease would be in the public interest only upon the aforesaid conditions.

Except as herein expressly admitted, United States denies the truth of each and every allegation contained in the complaint in so far as they conflict either with the allegations herein, or with the statements or conclusions [fol. 122] of fact included in said report and order of June 9, 1930.

Wherefore, having fully answered the bill of complaint, United States prays that the relief therein prayed be denied and the complaint dismissed with costs to the plaintiffs, and that it have the benefit of such other and further orders, decrees, or relief as may be just and proper.

(Signed) Elmer B. Collins, Elmer B. Collins, Special Assistant to the Attorney General. John Lord O'Brian, Assistant to the Attorney General. Joseph A. Tolbert, United States Attorney.

Duly sworn to by Elmer B. Collins. Jurat omitted in printing.

[fol. 123] IN UNITED STATES DISTRICT COURT

[Title omitted]

INTERVENTION OF INTERSTATE COMMERCE COMMISSION—Filed January 23, 1931

To the Honorable Judges of said Court:

In accordance with the provisions of section 212 of the Judicial Code, 36 Stat. L. 1150, (U. S. Code, Supp. II,

Title 28, Sec. 45a), we hereby enter the appearance of the Interstate Commerce Commission, as a party defendant, and of ourselves as its counsel, in the above-entitled suit.

(Signed) Daniel W. Knowlton, (Signed) H. L. Underwood.

[fol. 124] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed January 23, 1931

The Interstate Commerce Commission, intervening defendant in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the plaintiff's Bill of Complaint contained, for answer thereto, or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering paragraph I of the Bill of Complaint, the Commission admits, for the purposes of this suit, that the allegations therein contained are true.

II

Answering paragraph II to XV inclusive of the Bill of [fol. 125] Complaint, the Commission admits and alleges that it made and entered the order dated June 9, 1930, referred to in paragraph II of the Bill of Complaint, and made a part thereof as Exhibit No. 1, in proceedings then pending before it entitled Investigation and Suspension Docket No. 3290 and No. 3332, Restriction in Routing in Connection with the Georgia & Florida Railroad Between Greenwood, S. C., and Augusta, Ga.; that said proceedings were initiated by the Commission upon complaint, without formal pleadings, for the purpose of determining the lawfulness of the rates, charges, regulations and practices stated in certain schedules contained in numerous

specified tariffs theretofore filed with the said Commission; that to said proceedings the carriers parties to such schedules, including the plaintiffs herein, were made respondents that full hearings were had and thereafter the Commission made and entered and served upon all parties in said proceedings, the report of June 9, 1930, 165 I. C. C. 3, referred to in paragraph II of the Bill of Complaint, and made a part thereof as Exhibit No. 1, to which the Commission respectfully refers the Court for information concerning its findings and requirements in the premises; that in said proceedings the parties thereto, including the plaintiffs herein, were, and each of them was, accorded the full hearing provided for by the Interstate Commerce Act; that in said hearings a large volume of testimony and other evidence bearing upon the matters covered in said report and order was submitted to the Commission for consideration, including testimony and other evidence submitted on [fol. 126] behalf of plaintiffs herein by their counsel; that at said hearings and subsequently, both orally and in brief filed in said proceedings, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, including the particular questions raised by plaintiffs in this suit, whereupon the Commission determined said matters and entered and served upon all parties to said proceedings, including the plaintiffs herein, its said report and order; that said report and order included the Commission's findings of fact, decision, conclusions, order and requirements in the premises, and that, upon the evidence aforesaid, and as shown in and by said report, the Commission made the findings and stated the conclusions upon which said order is based.

The Commission further alleges that the findings and conclusions in said report were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceedings as aforesaid.

The Commission further alleges that in making said report it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the parties to said proceedings by their respective counsel, including matters covered by the allegations of the Bill of Complaint herein.

The Commission further alleges that the said order of June 9, 1930, was not made or entered either arbit-arily, or unjustly, or contrary to the relevant evidence, or without evidence to support it; that in making said order the Com-[fol. 127] mission did not exceed the authority which had been duly conferred upon it, and the Commission denies each and all allegations to the contrary contained in the Bill of Complaint herein.

Further answering paragraph II of the Bill of Complaint, the Commission denies that by its order of June 9, 1930, it has erroneously construed the conditions imposed by it in the so-called Clinchfield Lease case and denies that the said order is contrary to the provisions of paragraph 4 of Section 15 of the Interstate Commerce Act or of any part of said Act.

Further answering paragraphs III (c) and (d), and VI, the Commission denies that the several railroads in said paragraphs specified have been or are now operated in conjunction and under a common management or control with the Atlantic Coast Line Railroad Company within the meaning of paragraph (4) of Section 15 of the Interstate Commerce Act, and denies that the Commission has so found and/or determined.

In further answer to paragraph IV of the Bill of Complaint, the Commission avers that the allegations therein contained with respect to negotiations or representations as to the position or attitude of the several parties referred to in said paragraph, as to conditions proposed by the Commission under which approval of the Clinchfield Lease would be granted, are impertinent and irrelevant and are merely arguments presented to the Commission in connection with the said lease application; that said allegations are immaterial, for the reason that all negotiations, dis-[fol. 128] cussion and argument as to the wisdom or advisability of the conditions proposed, and as to what conditions should be made, were merged in the conditions as imposed by the Commission as a part of its approval of said lease application; that said allegations have no proper place in the bill and this defendant moves that they be stricken from the bill. But, if deemed material and pertinent, the Commission denies that the said lease applicants specified in said paragraph informed the Commission that they would not accept the lease unless conditions 3 and 4

thereof were modified or eliminated; denies that the said conditions were changed to meet or accord with the views or position of said applicants, and denies that the Commission intended to modify or change them to meet the views or wishes of the applicants.

The Commission further avers that by accepting the said lease, the lease applicants, who are parties plaintiff to this suit, took the same subject to all the conditions attached by the Commission to its approval and thereby consented to said conditions, became, were and now are bound to a strict observance thereof; that said conditions particularly conditions 3 and 4, had direct relation to commerce subject to regulation and control of the Commission, and the imposition of all the conditions subject to which the said lease was approved was within the scope of the power and authority vested in it under and by virtue of the provisions of the Interstate Commerce Act, particularly Section 5 (2) thereof.

For further answer to paragraph XII and XV the Commission denies that its said order of June 9, 1930, does or [fol. 129] will have the effect alleged in said paragraphs; denies that its said order is invalid or beyond its power, for the reasons set forth in said paragraph or for any other reason; and denies that the plaintiffs or any of them will suffer continuing and irreparable damage or any damage, if the said order of June 9, 1930, is not stayed and enjoined.

Except as herein expressly admitted, the Commission denies the truth of each and all the allegations contained in the complaint in so far as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said report and order of June 9, 1930, which report and order are hereby referred to and made a part hereof.

All of which matters and things the Commission is ready to aver, maintain, and prove as this Honorable Court shall direct, and hereby prays that said complaint be dismissed.

Interstate Commerce Commission, by (Signed) H. L. Underwood, Principal Attorney. (Signed) Daniel W. Knowlton, Chief Counsel.

[fol. 130] *Duly sworn to by Ezra Brainerd. Jurat omitted in printing.*

[fol. 131] IN UNITED STATES DISTRICT COURT

[Title omitted]

INTERVENTION OF PIEDMONT AND NORTHERN RAILWAY COMPANY—Filed January 5, 1931

To the Honorable the Judges of said Court:

In accordance with the provisions of the Act of June 18, 1910, (36 Stat. 539, 543), and as provided by the order and rule to show cause entered in the above entitled suit on December 27, 1930, I hereby enter the appearance of the Piedmont and Northern Railway Company as a party defendant, and of myself as its Counsel, in the above entitled suit.

(Signed.) W. S. O'B. Robinson, Jr., Attorney for Piedmont and Northern Railway Company.

[fol. 132] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF PIEDMONT AND NORTHERN RAILWAY COMPANY, Intervening Defendant—Filed January 23, 1931

Piedmont and Northern Railway Company, a corporation duly organized and existing under the laws of the State of South Carolina, with its home office at Greenville, in the Western District of said state, having intervened in the above entitled suit as a defendant, for its answer to the bill of complaint, alleges:

For a First Defense

The bill of complaint, with the exhibits attached thereto and made a part thereof, is without equity on its face, in that it appears on the face of the bill of complaint by the plaintiffs' own showing that they are not entitled, nor is either of them entitled, to the relief prayed for against the United States, nor to any relief arising from the facts alleged in said bill of complaint.

Wherefore Piedmont and Northern Railway Company moves that the bill of complaint be dismissed, and prays that an appropriate order and decree to that end may be entered.

[fol. 133] For a Second Defense

I

The allegations of Paragraph I of the bill of complaint are admitted.

II

The allegations of Paragraph II as to the nature, character and purpose of the suit are admitted, except it is denied that the suit arises under the Constitution, and it is also denied that the plaintiffs are entitled, or that either of them is entitled, to maintain said suit on the merits. It is admitted that the copy of the order and accompanying report of the Commission in Investigation and Suspension Docket No. 3290, attached to and made a part of the complaint is a true copy. It is denied that the Commission by said order erroneously construed Conditions 3 and 4 of the Clinchfield lease, or that said order is contrary to the provisions of Paragraph 4, of Section 15 of the Interstate Commerce Act.

III

Defendant admits that the map attached to the bill of complaint as Exhibit No. 2 correctly shows the physical location of the railroads named in Paragraph III and referred to on said map, except that the lines of this defendant and those of the Georgia & Florida Railroad are not accurately located on said map, but merely roughly indicated thereon. It is admitted that the lines of railway described in said paragraph extend from, to and between points therein named, and that the Atlantic Coast Line Railroad Com-
[fol. 134] pany owns approximately 51% of the capital stock of the Louisville & Nashville Railroad Company. Except as herein admitted defendant denies the facts and conclusions alleged in said paragraph. It specifically denies that the railroad of the Charleston & Western Carolina Railway Company, and the railroads referred to as the

Georgia Railroad, are operated in conjunction with and under the common management or control of the Atlantic Coast Line Railroad; yet it alleges that the allegations that said railroads are so operated are immaterial, for the reason that even if said allegations are true the proposed restrictions which the Commission by the order complained of in this suit required to be cancelled, were in violation of the Conditions which the Commission imposed in the Clinchfield Lease case, and were otherwise unlawful as hereinafter alleged.

IV

Defendant admits that in 1923 the Atlantic Coast Line Railroad Company and Louisville & Nashville Railroad Company filed an application before the Interstate Commerce Commission under Paragraph 2 of Section 5 of the Interstate Commerce Act for authority to acquire control by lease of the properties described in the bill of complaint as the Clinchfield Railroad, and also for authority under Section 20a of the Act to assume obligations as set out in the lease. The nature and purpose of said applications, and the proceedings thereon, are recited in the report of the Commission in the Clinchfield Railway lease case, a copy of which said report is attached to the bill of complaint as Exhibit No. 4. Numerous parties, including defendant [fol. 135] and the Receiver of the Georgia & Florida Railroad, did intervene in said proceeding and opposed the lease on the ground that the control of the Clinchfield Railroad by the Atlantic Coast Line Railroad Company and the Louisville & Nashville Railroad Company, the applicants, would be contrary to the public interest, especially unless Conditions were imposed which would require the Clinchfield to be maintained as an open route equally available to all connections. It was shown that the Coast Line had other open and workable routes between points at and beyond the Ohio River and points in the Southeast, competitive with the Clinchfield route, by means of which other routes the Atlantic Coast Line secured longer hauls and more satisfactory revenues than it would be able to secure over the Clinchfield route, so that unless provision was made for the use of the Clinchfield by other carriers there might be a diminution of the use of the Clinchfield as a link

in through routes in the event of the approval of the lease. Defendant showed that it was a competitor of the Charleston & Western Carolina Railway Company for traffic moving over the Clinchfield Railroad and interchanged with it at Spartanburg, and that the Atlantic Coast Line Railroad Company was closely affiliated with the Charleston & Western Carolina Railway Company, and defendant urged that Conditions be attached to the approval of the lease which would prevent the Atlantic Coast Line Railroad Company from restricting the use of the Clinchfield Railroad to the prejudice of defendant and in favor of the Charleston & Western Carolina Railway Company. The Receiver of the Georgia & Florida Railroad asserted the purpose [fol. 136] of that railroad, when it obtained the necessary authority from the Interstate Commerce Commission, to extend its line from Augusta, Georgia, to a new Northern terminus at Greenwood, South Carolina, where it would connect with the defendant's line and through the medium of the defendant obtain a connection with the Clinchfield Railroad at Spartanburg, South Carolina. He showed that the principal purpose of the proposed extension was to enable the Georgia & Florida to participate in the movement of traffic between points at and beyond the Ohio River and points in the Southeast, and that unless conditions were imposed which would require the Clinchfield to be maintained as an open route equally available to all carriers which then connected or might thereafter connect with the Clinchfield, the purpose of the Georgia & Florida to extend its line would be defeated.

Defendant alleges that the literal meaning as well as the plain intent of the Conditions which the Commission attached to its approval of the lease, particularly Conditions, 1, 3 and 4, was to require the Clinchfield Railroad to be maintained as an open route equally available to all connections, including defendant and the Greenwood extension of the Georgia & Florida Railroad; and that the restrictive schedules involved in this suit are in violation of said Conditions.

The Atlantic Coast Line Railroad Company and the Louisville & Nashville Railroad Company did protest against said Conditions, especially against Conditions 3 and 4, urging, among other things, that said Conditions

would require the Atlantic Coast Line Railroad Company [fol. 137] to become a party to through routes via the Clinchfield Railroad which would shorthaul the line of the Charleston & Western Carolina Railway with which the Atlantic Coast Line Railroad was affiliated, and relying in support of its protest on Section 4 of Paragraph 15 of the Interstate Commerce Act as prohibiting such short-hauling. The Commission refused to change the Conditions so as to remove the grounds of said protest, but on the contrary expressly found and stated in its report that unless the Conditions were observed the proposed control of the Clinchfield Railroad by the applicants would not be in the public interest.

The Receiver of the Georgia & Florida Railroad did request the Commission to modify the language of Condition 3 so as to make it provide not only for existing but also for future and potential routes in connection with the Clinchfield; but the request was not pressed as the Receiver admitted that Condition 4 provided for future and potential routes, and he requested no change in this Condition. Except as herein admitted, defendant denies the facts and conclusions alleged in Paragraph IV.

V

Defendant denies the facts and conclusions alleged in Paragraph V, with these exceptions: It admits that after the approval of the Clinchfield lease the lessees did set up an operating organization known as Clinchfield Railroad Company, and that in many instances the Atlantic Coast Line Railroad Company has controlled the traffic policies of said organization and its management and operation of said leased properties. Defendant alleges that the routing restrictions involved in this suit which were nominally pub- [fol. 138] lished for the account of the Clinchfield Railroad were in fact published at the instance and dictation of the Atlantic Coast Line Railroad Company; that said routing restrictions, if they had gone into effect, would have been detrimental to the interest of the Clinchfield Railroad considered as a separate operating unit, and that the Management of the Clinchfield Railroad protested against the publication of said restrictions, but the Atlantic Coast Line Railroad Company, acting in the interest of the Charleston

& Western Carolina Railway Company, required the same to be published notwithstanding said protest.

VI

Defendant denies the facts and conclusions alleged in Paragraph VI; but alleges that the allegations of said paragraph are immaterial for the reasons hereinbefore set forth in answer to Paragraph III.

VII

Defendant denies the facts and conclusions alleged in Paragraph VII, with this exception: It admits that no route existing as an open and workable route via the Clinchfield Railroad at the time of the making of said lease has been closed or otherwise materially interfered with.

VIII

Defendant admits the facts alleged in Paragraph VIII, with these exceptions: The line of the defendant referred to in said paragraph is a line of interurban electric railway, subject to the provisions of the Interstate Commerce Act pertinent to this suit, namely, to those provisions relating to rates, routes, the movement of traffic, and its in-
[fol. 139] terchange with connecting carriers. Defendant's line of railway between Greenwood and Spartanburg was in operation and connected with the Clinchfield Railroad at Spartanburg at and prior to the time of the approval of the Clinchfield lease, and at and prior to said time defendant interchanged traffic with the Clinchfield Railroad at Spartanburg and participated in connection with it in through routes and joint rates. The Greenwood extension of the Georgia & Florida Railroad connects with the defendant's line at Greenwood, South Carolina, and through the medium of the defendant with the Clinchfield Railroad at Spartanburg, South Carolina. One of the purposes, for which the construction of said extension was authorized by the Interstate Commerce Commission, was in order that the Georgia & Florida Railroad might obtain said connections so as to be able to participate, in connection with the Clinchfield Railroad, in through routes and joint rates, particularly in the movement of traffic between points at and

beyond the Ohio River and points in the Southeast. Defendant alleges that under the terms of the Conditions which the Commission attached to its approval of the Clinchfield lease both it and the Georgia & Florida Railroad are, and each of them is, lawfully entitled to use the Clinchfield Railroad as a link in through routes, and to participate in connection with the Clinchfield Railroad in through routes and joint rates between the points designated in Condition 4 of the Clinchfield lease, and otherwise to use the same as provided in said Conditions.

IX

Defendant denies the facts and conclusions alleged in Paragraph IX, with this exception: It admits that prior [fol. 140] to the construction of said Greenwood extension of the Georgia & Florida Railroad the Clinchfield, Charleston & Western Carolina Railway Company, Atlantic Coast Line Railroad Company and Georgia Railroad were parties to tariffs which provided through routes and joint rates for the movement of the traffic described in said paragraph.

X

Defendant admits the publication of the restrictive schedules referred to in Paragraph X. All of said restrictive schedules were published in or as supplements to tariffs which provide through routes and joint rates in connection with the Clinchfield Railroad between the points designated and described in Condition 4 of the Clinchfield lease, between which points it was required by the terms of said Conditions that the line of the Clinchfield should be maintained as an open route available to all carriers which then connected or might thereafter connect with the Clinchfield Railroad, and which might desire to participate in through routes and joint rates between said points, to-wit, to quote from Condition 4: "between points in territory North and West of the line of the Clinchfield, and points at and beyond the Ohio River on the one hand, and points in the Southeast and Carolina territory on the other." The restrictions purporting to have been published for the account of the Clinchfield read verbatim or in substance as follows:

"Rates to or via (or from the line of the Georgia & Florida Railroad between Greenwood, S. C., and Augusta, Ga., in connection with the Carolina, Clinchfield and Ohio Railway, Carolina, Clinchfield and Ohio Railway of South Carolina and Clinchfield Northern Railway of Kentucky, apply only to (or from) stations on the Georgia & Florida Railroad between Greenwood, S. C., and Augusta, Ga., [fol. 141] (and only on traffic interchanged by C. & W. C. Ry. and G. & F. R. R. at Greenwood, S. C., delivered to (or received from) C. & W. C. Ry., by C. C. & O. Ry. of S. C.)"

Said restrictions were not only designed and intended to accomplish the purpose alleged in said paragraph, to-wit, to give the Charleston & Western Carolina Railway the long haul on traffic moving over the Clinchfield Railroad from, to or through Augusta, Georgia, to the exclusion of any haul of such traffic by defendant, or by the Georgia & Florida Railroad over its Greenwood extension but were also designed and intended to exclude defendant from all traffic moving between the Clinchfield and Georgia & Florida Railroads, by diverting all such traffic to the line of the Charleston & Western Carolina Railway Company. Except as herein admitted the facts and conclusions alleged in Paragraph X are denied.

XI

The defendant admits the facts alleged in Paragraph XI, except that it denies the statements and conclusions therein contained as to what the evidence introduced at the hearing before the Commission by the respondents, including the Atlantic Coast Line Railroad Company, showed, or tended to show. Defendant refers to the copy of the report and order of the Commission annexed to the bill of complaint as Exhibit 1 for a correct statement of the Commission's findings and conclusions. Defendant alleges that the matters and things set forth in the bill of complaint and sought to be put in issue before the court were all before the Interstate Commerce Commission, and were fully heard and determined by it; that the Commission accorded [fol. 142] to the parties to said proceeding, including the plaintiffs herein, the full hearing required by law; that the Commission in its report in writing made after said hear-

ing stated its findings and conclusions and issued its order in the premises; that said findings and conclusions were and are, and each of them was and is, fully supported and justified by the evidence before the Commission; and that the plaintiffs are, and each of them is, bound by said findings of the Commission.

XII

Defendant denies the facts and conclusions alleged in Paragraph XII.

XIII

Defendant denies the facts and conclusions alleged in Paragraph XIII, except that the defendant is without knowledge as to the intentions of the lessees in accepting the Conditions which the Commission attached to its approval of the Clinchfield lease, but it alleges that the lessees are estopped to deny that they intended to consent to said Conditions as the same are set out in the report of the Commission in the Clinchfield lease case; and the defendant further alleges that said Conditions were an integral part of the order approving said lease, and that the lessees having accepted said lease subject to said Conditions cannot now and in this suit collaterally attack that part of the Commission's order in the Clinchfield lease case which imposed said Conditions on the lessees.

XIV

Defendant denies the facts and conclusions alleged in Paragraph XIV, except that it admits that if the plaintiffs fail or refuse to obey said order of the Commission they [fol. 143] will be subject to the penalties prescribed by law.

XV

Defendant denies the facts and conclusions alleged in Paragraph XV.

For a Third Defense

The record before the Commission in said Investigation and Suspension Docket No. 3290, and the evidence intro-

duced on the hearing of said proceeding show that the Clinchfield Railroad participates in through routes and joint rates in connection with the line of the Southern Railway Company between Spartanburg and Augusta, the line of the Charleston & Western Carolina Railway Company between said points, and the line of the Seaboard Air Line Railway Company between Bostic, North Carolina, and Greenwood, South Carolina, and interchanges with said railroads, and each of them, traffic having its origin or destination at Augusta and points South of Augusta; that said routes are competitive with routes over the defendant's line between Spartanburg and Greenwood, and the Greenwood extension of the Georgia & Florida Railroad between Augusta and Greenwood; and that the restrictive schedules involved in this suit would have left the joint rates in effect over said other routes, while at the same time said schedules would have prevented said joint rates from being applied to traffic moving over the line of the defendant and the Greenwood extension of the Georgia & Florida, and made applicable to such traffic materially higher rates consisting of the combination of the local rates of each line participating in the movement of such traffic. Said [fol. 144] restrictive schedules would have denied to defendant and the Georgia & Florida Railroad facilities for the interchange of traffic with the Clinchfield Railroad, and for receiving, forwarding and delivering property in connection with the Clinchfield Railroad equal to the facilities afforded the Southern Railway Company, the Charleston & Western Carolina Railway Company and the Seaboard Air Line Railway Company, would have discriminated in rates, fares and charges in favor of said last named railroads to the prejudice of defendant and the Georgia & Florida Railroad, and would have resulted in closing routes over the defendant's line and the Greenwood extension of the Georgia & Florida, while leaving open competitive routes over the lines of said other railroads, in violation of Paragraph 3 of Section 3 of the Interstate Commerce Act. This violation, while not expressly set forth in the majority report of the Commission as ground for the Commission's order directing the cancellation of said restrictive schedules, was made the basis of the concurring report of Commissioner Porter, to which defendant refers; and defendant alleges said violation and relies upon the facts

and conclusions stated in said concurring report as furnishing grounds upon which said order of the Commission should be sustained, in addition to the grounds set forth in the majority report.

Wherefore defendant, having fully answered, prays:

1. That this answer be taken and considered as its return to the order and rule to show cause heretofore made and entered in this suit on December 27, 1930.

2. That the bill of complaint be dismissed at the cost of the plaintiffs, and for such other and further relief as may be appropriate.

[fol. 145] (Signed) W. S. O'B. Robinson, Jr., Attorney for Piedmont and Northern Railway Company.

Duly sworn to by E. Thomason. Jurat omitted in printing.

[fol. 146] IN UNITED STATES DISTRICT COURT

[Title omitted]

INTERVENTION OF GEORGIA & FLORIDA RAILROAD AND W. V. GRIFFIN AND H. W. PURVIS, AS RECEIVERS THEREOF

To the Honorable the Judges of said Court:

Comes now Georgia & Florida Railroad and W. V. Griffin and H. W. Purvis, as Receivers of said Georgia & Florida Railroad, all of whom were parties in the proceeding before the Interstate Commerce Commission in which the order which is the subject matter of attack in the above entitled cause was entered, in accordance with the provisions of the Act of June 18, 1910, as amended, (36 Stat. 539-543, U. S. C. 28, Sections 45, et seq.) and in accordance with the terms of the order and rule to show cause entered in said proceeding on December 27, 1930, and tender this their intervention in said cause and pray that they may be by an appropriate order of Court made parties to said cause. The undersigned hereby enter the appearance of Georgia & Florida Railroad and W. V. Griffin and H. W. Purvis, as Receivers of Georgia & Florida Railroad, as parties defen-

dant, and further enter their appearance as counsel for said intervenors in said cause.

This 15th day of January, 1931.

W. H. Nicholson, James M. Hull, Jr., Geo. B. Barrett, J. J. Willingham, Attorneys for Georgia & Florida Railroad and W. V. Griffin and H. W. Purvis, as Receivers of Georgia & Florida Railroad. Hull, Barrett & Willingham, of Counsel for Intervenors. [fol. 147] Georgia & Florida Railroad, by S. W. Saye, Vice-President. W. V. Griffin and H. W. Purvis, as Receivers of Georgia & Florida Railroad, by H. W. Purvis, Receiver and General Manager for Receivers.

[fol. 148] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF GEORGIA & FLORIDA RAILROAD AND W. V. GRIFFIN AND H. W. PURVIS, ITS RECEIVERS—Filed Jan. 23, 1931

Georgia & Florida Railroad, a corporation duly organized and existing under the laws of the States of South Carolina and Georgia, with its principal office and place of business in Augusta, Georgia, and W. V. Griffin and H. W. Purvis, as Receivers of Georgia & Florida Railroad, under an order of appointment entered by the Honorable William H. Barrett, United States Judge for the Southern District of Georgia, under date of October 19, 1929, and a confirmatory order entered by the Honorable H. H. Watkins, United States Judge for the Western District of South Carolina, under date of October 19, 1929, having intervened in the above entitled suit, as defendants, file this their joint answer and defense to the bill of complaint filed herein, and say:

For a first defense:

1. The bill of complaint, with the exhibits attached thereto and made a part thereof, is without equity on its face, in that it appears from the allegations of said bill and from the exhibits thereto attached that neither plaintiffs, nor any of them, are entitled to the relief prayed for against the

United States, nor to any relief arising from the facts alleged in said bill of complaint:

Wherefore Georgia & Florida Railroad and its Receivers, W. V. Griffin and H. W. Purvis, move that the bill of complaint be dismissed, and pray that an appropriate order and decree to that end may be entered.

For a second defense and answering said bill of complaint, these defendants say:

[fol. 149] 1. The allegations of paragraph 1 of the bill of complaint setting forth the corporate existence and domiciles of the various parties plaintiff are admitted.

2. These defendants admit the allegations of the second paragraph of said petition as to the nature, character and purpose of the present suit, but deny that said action arises under the Constitution, and further deny that the plaintiffs, or either of them, are entitled to maintain said suit on its merits. It is admitted that the copy of the order and accompanying report of the Interstate Commerce Commission in Investigation and Suspension Docket No. 3290 attached to and made a part of the complaint is a true copy, but defendants deny that the Commission by said order erroneously construed conditions 3 and 4 of the Clinchfield lease, or that said order is contrary to the provisions of paragraph 4 of Section 15 of the Interstate Commerce Act. Except as specifically admitted, the allegations of said paragraph are denied.

3. These defendants admit that the map referred to in the third paragraph of said bill of complaint and attached thereto as Exhibit 2 correctly shows the physical location of the railroads referred to in said paragraph, except that the lines of the Georgia & Florida Railroad and Piedmont and Northern Railway Company are not accurately located on said map, but merely roughly indicated thereon. These defendants further admit that the lines of railway described in said paragraph extend from, to and between the points therein named, and that the Atlantic Coast Line Railroad Company owns approximately fifty-one per cent of the capital stock of the Louisville and Nashville Railroad Company. Except as herein admitted, defendants deny the facts and conclusions alleged in said paragraph, and spe-

cifically deny that the railroad of the Charleston & Western Carolina Railway Company and the railroads referred to as the Georgia Railroad are operated in conjunction with and under the common management or control of the Atlantic Coast Line Railroad Company. Further answering said paragraph, these defendants aver that said allegations as to the operation of said roads under common management [fol. 150] and control by the Atlantic Coast Line Railroad Company are immaterial, for the reason that if said allegations were true, the proposed restrictions which the Commission by the order complained of in this suit required to be canceled, were in violation of the conditions which the Commission imposed in the Clinchfield lease case, and were otherwise unlawful, as hereinafter set forth. Except as specifically admitted, the allegations of said paragraph are denied by these defendants.

4. Answering the fourth paragraph of said bill of complaint, these defendants admit that in 1923 the Atlantic Coast Line Railroad Company and the Louisville and Nashville Railroad Company filed an application with the Interstate Commerce Commission under the provisions of paragraph 2 of Section 5 of the Interstate Commerce Act for authority to acquire control, by lease, of the properties described in the bill of complaint as the Clinchfield Railroad, and also for authority under Section 20a of the Act to assume obligations as set out in the proposed lease. The nature and purpose of said application and the proceedings had thereon are reported in the report of the Commission on the Clinchfield case, a copy of which report is attached to the bill of Complaint as Exhibit 4. Numerous parties, including the Piedmont and Northern Railway Company and the then Receiver of Georgia and Florida Railway, the predecessor in title of Georgia & Florida Railroad, intervened in said proceeding and opposed the lease on the ground that the control of the Clinchfield Railroad by the Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company, the applicants, would be contrary to the public interest, especially unless conditions were imposed which would require the Clinchfield to be maintained as an open route equally available to all connections. It was shown that the Coast Line had other open and workable routes between points at and beyond

the Ohio River, and points in the Southeast competitive with the Clinchfield route, by means of which the Atlantic Coast Line secured longer hauls and more satisfactory revenues than it would be able to secure under the Clinchfield [fol. 151] route, so that unless provision was made for the use of the Clinchfield by other carriers, there might be a diminution of the use of the Clinchfield as a link in through routes in the event of the approval of the lease.

The then Receiver of the Georgia & Florida Railway at said hearing asserted by intervention the purpose of that railroad, when it obtained the necessary authority from the Interstate Commerce Commission to extend its line from Augusta, Georgia, to a new Northern terminus at Greenwood, South Carolina, where it would connect with the Piedmont and Northern, and through the connection so made with the lines of the Piedmont and Northern Railway Company, obtain a connection with the Clinchfield Railway at Spartanburg, South Carolina. Said Receiver further showed that the principal purpose of the proposed extension was to enable the Georgia & Florida Railway, which was later reorganized into the Georgia & Florida Railroad, to participate in movements of traffic between points at and beyond the Ohio River and points in the Southeast; that unless conditions were imposed which would require the Clinchfield to be maintained as an open route equally available to all carriers which then connected or might thereafter connect with the Clinchfield, the purpose of the Georgia & Florida Railroad in extending its line would be defeated, and the extension to Greenwood when constructed would be discriminated against in favor of the Charleston & Western Carolina Railway Company by means of restrictions in joint rates.

These defendants allege that the literal meaning, as well as the plain intent of the conditions which the Commission attached to its approval of the lease, and particularly conditions 1, 3, and 4, was to require the Clinchfield Railroad to be maintained as an open route equally available to all connections, including the Georgia & Florida Railroad, upon the completion of its extension to Greenwood and connection with the Piedmont and Northern Railway Company, and that the restrictive notes involved in this suit were in direct violation of said conditions. Defendants admit that

the Atlantic Coast Line Railroad Company and the Louisville and Nashville Railroad Company did protest against [fol. 152] said conditions, especially against conditions 3 and 4, urging among other things that said conditions would require the Atlantic Coast Line Railroad Company to become a party to through routes via the Clinchfield Railroad which would short haul the line of the Charleston & Western Carolina Railway, with which the Atlantic Coast Line Railroad was affiliated, and in support of its protest relied upon the provisions of Section 4 of Paragraph 15 of the Interstate Commerce Act prohibiting such short haul. The Commission refused to change the conditions so as to remove the grounds of said protest, but upon the contrary expressly found and stated in its report as shown by the exhibit attached to the present complaint that unless the conditions were observed, the proposed control of the Clinchfield Railroad by the applicants would not be in the public interest.

Defendants further admit that the Receiver of Georgia & Florida Railway requested the Commission to modify the language of condition 3 of the Clinchfield lease so as to make it applicable not only to existing but also to future and potential routes in connection with the Clinchfield, but this request was made through an abundance of precaution and was not pressed, owing to the recognition by the Receiver of Georgia & Florida Railway that condition 4 included in the lease provided for future and potential routes, and required no modification or amplification. Except as herein specifically admitted, defendants deny the facts and conclusions alleged in paragraph 4.

5. Answering the fifth paragraph of the bill of complaint filed herein, these defendants admit that after the acceptance of the Clinchfield lease, with the conditions prescribed by the Commission included therein, the lessees did provide an operating organization known as the Clinchfield Railroad Company, and that in many instances the Atlantic Coast Line Railroad Company has controlled the traffic policies of said organization, and the management and operation of said leased property. Further answering said paragraph, these defendants allege that the routing re- [fol. 153] strictions involved in this suit, which were nominally published for the account of the Clinchfield Railroad,

were in fact published at the instance and dictation of the Atlantic Coast Line Railroad Company, over the protest of the management of the Clinchfield Railroad, and that said routing restrictions were arbitrarily imposed by the Atlantic Coast Line Railroad Company, solely in the interest of the Charleston & Western Carolina Railway Company, and, had they gone into effect, would have been detrimental to the interests of the Clinchfield.

6. The facts and conclusions set forth in paragraph 6 of the original bill of complaint are denied, but these defendants aver that said allegations are immaterial, for the reasons that the application of the provisions of paragraph 4 of Section 15 of the Interstate Commerce Act referred to in said paragraph is modified and controlled by the conditions imposed in the Clinchfield lease hereinabove referred to, which was accepted by plaintiffs and constitutes a waiver on the part of the lessees of the provisions of said section.

7. These defendants admit that no route existing as an open and workable route via the Clinchfield at the time of making said lease has been closed or otherwise materially interfered with, but defendants deny the other facts and conclusions set forth in paragraph 7, with the exception above stated. Further answering said paragraph, these defendants aver that the action of the Atlantic Coast Line Railroad Company in imposing the restrictions which were the subject matter of consideration by the Interstate Commerce Commission at the time of the entry of the order herein complained of, was and is in direct violation of the provisions of paragraphs 3 and 4 of the Clinchfield lease, resulted in discrimination as against defendants, and that but for the suspension of said restrictions the Clinchfield would not be available as a link for through traffic via the gateway established by the construction of the Greenwood Extension of Georgia & Florida Railroad from Augusta to Greenwood and its connection there with the Piedmont and Northern Railway lines for reaching the Clinchfield at Spartanburg.

[fol. 154] 8. Answering the eighth paragraph of said original bill, these defendants admit that the Georgia & Florida Railway was under proper authority from the Interstate Commerce Commission (117 I. C. C. 473) reorgan-

ized into the present company, Georgia & Florida Railroad, under date of December 23, 1926, with permission accorded the new corporation to construct a line of railroad extending from the Northern terminus of its said line at Augusta, Georgia, to Greenwood, South Carolina, for the purpose of connecting with the line of the Piedmont and Northern Railway Company, and in this way reaching the Clinchfield gateway. The building of this extension was for the avowed purpose of establishing a through route for the movement of traffic over the Piedmont and Northern Railway lines, to enable the Georgia & Florida Railroad to participate in commodities moving Southbound over the Clinchfield destined to points in Georgia and Florida, and Northbound movements of freight from Southern territory through the Clinchfield gateway. Defendants allege that at the time of obtaining a certificate of public convenience and necessity for the construction of said extended line, neither the Atlantic Coast Line Railway Company nor any of its affiliated carriers interposed any objection thereto, and upon the basis of the authority granted by the Interstate Commerce Commission, authorizing the building of said extension for the specific purpose of securing through traffic over the Clinchfield, and in reliance upon the protection afforded by the conditions of the Clinchfield lease, said reorganization was completed and the Greenwood extension built at an expense of approximately $3,300,000.00. These defendants aver that the plaintiffs herein had full knowledge of the object and purpose of the Georgia & Florida Railroad in extending its line from Augusta to Greenwood to participate in through traffic moving over the Clinchfield, that in the Clinchfield lease case the Receiver of the Georgia & Florida Railway intervened expressly for the purpose of protecting the rights of the railroad in building such exten-
[fol. 155] sion, and that no objection of any kind was made to the authorization or construction of said extension until and after the Georgia & Florida Railroad had practically completed its said Greenwood Extension and was prepared to open the same for traffic, when restrictive notes were inserted at the instance of the present plaintiffs in all tariffs covering movements over said extension, which, but for suspension, would have largely destroyed the value of the investment made as above set forth. Further answering said paragraph, defendants allege that said Greenwood

Extension of Georgia & Florida Railroad connects with the line of the Piedmont and Northern Railway Company at Greenwood, South Carolina, and through the medium of the lines of said Piedmont and Northern Railway with the Clinchfield Railroad at Spartanburg, South Carolina, and these defendants aver that under the terms of the conditions which the Commission attached to its approval of the Clinchfield lease, both the Georgia & Florida Railroad and its Receivers and the Piedmont and Northern Railway Company are, and each of them is, lawfully entitled to use the Clinchfield Railroad as a link in through routes and to participate in connection with the Clinchfield Railroad in through rates and joint rates between the points designated in condition 4 of the Clinchfield lease, as well as to otherwise use the Clinchfield gateway as provided in the conditions imposed in said lease. Further answering said paragraph, defendants allege that the action of plaintiffs in permitting, without objection, the construction of the Greenwood Extension, with full knowledge of the intent and purpose of said construction to secure through traffic under the provisions of the Clinchfield lease, constitutes and is an equitable estoppal, and plaintiffs should not now be permitted to urge an interpretation of the conditions of said lease which would nullify the value of said extension, and be at variance with the clear meaning and intent of said conditions as construed and acted upon, with the knowledge of plaintiffs, by the Interstate Commerce Commission and Georgia & Florida Railroad at the time said extension was authorized and during its construction.

9. These defendants deny the facts and conclusions alleged in paragraph 9 of the original bill, save and except [fol. 156] that they admit that prior to the construction of said Greenwood Extension of the Georgia & Florida Railroad, the Clinchfield, Charleston & Western Carolina Railway Company, Atlantic Coast Line Railroad Company, and Georgia Railroad were parties to tariffs which provided through routes and joint rates for the movement of the traffic described in said paragraph.

10. These defendants admit the publication of the restrictive schedules referred to in paragraph 10 of the original bill of complaint. All of said restrictive schedules

were published in or as supplements to tariffs which provide through routes and joint rates in connection with the Clinchfield Railroad between the points designated and described in condition 4 of the Clinchfield lease, between which points it was required by the terms of said conditions that the line of the Clinchfield should be maintained as an open route, available to all carriers which connected or might thereafter connect with the Clinchfield Railroad, and which might desire to participate in through routes and joint rates between said points, to-wit, quoting from condition 4, "Between points in territory North and West of the line of the Clinchfield and points at and beyond the Ohio River on the one hand, and points in the Southeast and parallel territory on the other". The restrictions purporting to have been published for the account of the Clinchfield read verbatim or in substance as follows:

"Rates to or via (or from the line of the Georgia & Florida Railroad between Greenwood, S. C., and Augusta, Ga., in connection with the Carolina, Clinchfield and Ohio Railway, Carolina, Clinchfield and Ohio Railway of South Carolina and Clinchfield Northern Railway of Kentucky, apply only to (or from) stations on the Georgia & Florida Railroad between Greenwood, S. C., and Augusta, Ga., (and only on traffic interchanged by C. & W. C. Ry. and G. & F. R. R. at Greenwood, S. C. delivered to (or received from) C. & W. C. Ry., by C. C. & O. Ry. of S. C.)."

Said restrictions were not only designed and intended to accomplish the purpose described in said paragraph, to-wit, to give the Charleston & Western California Railway the long haul in traffic going over the Clinchfield Railroad from, to or through Augusta, Georgia, to the exclusion of any haul of such traffic by these defendants or by the Piedmont and Northern Railway, but were also de-
[fol. 157] signed and intended to exclude these defendants from all traffic moving over the Clinchfield by diverting such traffic to the lines of the Charleston & Western Carolina Railway Company. Except as herein admitted, the facts and conclusions alleged in paragraph 10 are denied.

11. Defendants admit the facts alleged in paragraph 11 of the original bill, except that they deny the statements and conclusions therein contained as to what the evidence

introduced at the hearing before the Commission by the respondents, including the Atlantic Coast Line, showed or tended to show. Defendants refer to the copy of the report and order of the commission annexed to the bill of complaint as Exhibit 1 for a correct statement of the Commission's findings and conclusions. Further answering said paragraph, defendants aver that the matters and things set forth in the bill of complaint and sought to be put in issue before this Court were all before the Interstate Commerce Commission, and were fully heard and determined by it; that the Commission accorded to the parties to said proceeding, including the plaintiffs herein, the full hearing required by law, and thereafter in its report in writing made after said hearing, stated its findings and conclusions, and issued its order in the premises, which findings and conclusions were and are, and each of them was and is, fully supported and justified by the evidence before the Commission, and the same are binding upon the plaintiffs and each of them.

12. The allegations of the 12th paragraph of said original bill are denied by these defendants.

13. For lack of sufficient information, defendants can neither admit nor deny the intention of the lessees in accepting the Clinchfield lease with the conditions incorporated therein by the Interstate Commerce Commission, but defendants allege that the lessees are estopped to deny their approval and consent to said conditions as the same are set out in the report of the Commission in the Clinchfield lease case, which conditions were an integral [fol. 158] part of the order approving the lease and cannot be collaterally attacked in the present suit. Except as set forth above, all of the allegations of the thirteenth paragraph of said bill are denied.

14. Defendants deny the allegations of the 14th paragraph of said bill, save and except they admit that penalties will be imposed as prescribed by law in the event of the failure of the plaintiffs herein to obey the order of the Interstate Commerce Commission referred to in said paragraph.

15. The allegations of the fifteenth paragraph of said bill are denied. Further answering said paragraph, de-

fendants allege that the restrictive routing notes, suspended by the order of the Commission which is the subject matter of this litigation, would have resulted in forcing the Georgia & Florida Railroad to short haul itself, through requiring it to relinquish or receive traffic at Augusta, Georgia, thereby making it impossible to secure the additional haul over the Greenwood Extension between Augusta and Greenwood and thus defeating the express purpose for which said extension was authorized by the Commission and built by the Railroad.

For a third defense, defendants allege:

The record before the Commission in said Investigation and Suspension Docket No. 3290, and the evidence introduced on the hearing of said proceeding show that the Clinchfield Railroad participates in through routes and joint rates in connection with the lines of the Southern Railway Company between Spartanburg and Augusta, the lines of the Charleston & Western Carolina Railway Company between said points and the line of the Seaboard Air Line Railroad Company between Bostic, North Carolina, and Greenwood, South Carolina, and interchanges with said railroads, and each of them, traffic having its origin or destination at Augusta and points South of Augusta. Said routes are competitive routes with the line of the Piedmont and Northern between Spartanburg and Greenwood, and the Greenwood Extension of Georgia & [fol. 159] Florida Railroad between Augusta and Greenwood, and the restrictive schedules involved in this suit would have left the joint rates in effect over said other routes while at the same time said restrictions would have prevented the application of said joint rates to traffic moving over the line of the Piedmont and Northern and Greenwood Extension of the Georgia & Florida, and made applicable to such traffic materially higher rates through requiring such rates to be made up of a combination of the local rates of each line participating in the movement of such traffic. Said restrictive schedules would have denied to the Piedmont and Northern Railway and these defendants facilities for the interchange of traffic with the Clinchfield Railroad and for receiving, forwarding and delivering traffic in connection with the Clinchfield Railroad equal

to the facilities afforded the Southern Railway Company. The Southern Railway Company, the Charleston & Western Carolina Railway Company and the Seaboard Air Line Railway Company, would have discriminated in rates, fares and charges in favor of said last named railroads to the prejudice of the Piedmont and Northern Railway Company and these defendants, and would have resulted in closing routes over defendants' lines and the Piedmont and Northern Railway Company's lines, while leaving open competitive routes over the lines of said other railroads in violation of paragraph 3 of Section 3 of the Interstate Commerce Act. While this violation was not expressly set forth in the majority report of the Commission as ground for the Commission's order directing the cancellation of said restrictive schedules, it was made the basis of the concurring report of Commissioner Porter, and defendants allege that said proposed restrictive routing notes did constitute a discrimination against the lines of the Georgia & Florida Railroad, in violation of paragraph 3 of Section 3 of the Interstate Commerce Act, and defendants rely upon the facts and conclusions stated in said concurring report and as shown by the record in said case, as furnishing additional grounds upon which said order of the Commission should be sustained.

Wherefore defendants, having fully answered, pray:

1. That this answer be taken and considered as a return to the order and rule to show cause heretofore made and [fol. 160] entered in this suit on December 27, 1930, the defendant Receivers herein having been duly authorized to appear in said proceeding and in this Court by an order of the Court of their appointment entered by the Honorable William H. Barrett, United States Judge of the District Court for the Southern District of Georgia, on January 17, 1931.

2. That the bill of complaint filed herein be dismissed at the cost of the plaintiffs, and that such other and fur-

ther relief be accorded these defendants as may be appropriate in the premises.

W. V. Griffin and H. W. Purvis, as Receivers of Georgia & Florida Railroad, by H. W. Purvis, Receiver and General Manager for the Receivers. Georgia & Florida Railroad, by S. W. Saye, Vice-president. Hull, Barrett & Willingham, Counsel for Georgia & Florida Railroad and Its Receivers. W. H. Nicholson, James M. Hull, Jr., George B. Barrett, J. J. Willingham, of Counsel for Georgia & Florida Railroad, and W. V. Griffin and H. W. Purvis, as Its Receivers.

[fol. 161] *Duly sworn to by H. W. Purvis. Jurat omitted in printing.*

[fol. 162] *Duly sworn to by S. W. Saye. Jurat omitted in printing.*

[fol. 163] Greenville, S. C., December 27, 1930.

The Secretary, Interstate Commerce Commission, Washington, D. C.; The Attorney General, Department of Justice, Washington, D. C.; Messrs. Hull, Barrett & Willingham, Division Counsel, Georgia & Florida Railway, Augusta, Georgia; W. S. O'B. Robinson, Esq., General Counsel, P. & N. Rwy., Charlotte, North Carolina; F. B. Grier, Esq., Vice-President, Atlantic Coast Line Rwy., Wilmington, North Carolina.

In re Atlantic Coast Line Railroad Co., Louisville and Nashville Railroad Company, Charleston & Western Carolina Railway Company, Plaintiffs, vs. The United States of America, Eq., 278

Dear Sirs: Upon a Bill of Complaint filed in the above-entitled Suit in this Court under date of today, his Honor Judge H. H. Watkins has signed an Order and Rule to Show Cause Convening a three Judge Court.

By agreement of the parties, the date for the holding of such Court has been set for Friday morning, January 23, 1931, at ten o'clock A. M. in the Federal Building, Charlotte, North Carolina.

Yours very truly, D. C. Durham, Clerk.

DCD:b.

[fol. 164] IN UNITED STATES DISTRICT COURT

[Title omitted]

On Application for Interlocutory Injunction, Rule to Show Cause Thereon, and Subpœna ad Respondendum

Argued January 23, 1931. Decided —— — ——

Before Parker and Northcott, Circuit Judges, and Watkins, District Judge

F. B. Grier, Carl H. Davis, and M. G. McDonald for Plaintiffs; Elmer B. Collins, Special Assistant to the Attorney General for Defendant; Daniel W. Knowlton and H. L. Underwood for Interstate Commerce Commission; W. S. O'B. Robinson for Piedmont & Northern Railway Company; W. H. Nicholson and Hull, Barrett & Willingham (James M. Hull, Jr., George B. Barrett and J. J. Willingham on brief) for Georgia & Florida Railroad Company.

I concur.

(Signed) Elliott Northcott, U. S. Circuit Judge.

I concur.

(Signed) H. H. Watkins, Dist. Judge.

OPINION—Filed March 9, 1931

[fol. 165] PARKER, Circuit Judge:

This is a suit instituted by the Atlantic Coast Line Railroad Company, the Louisville and Nashville Railroad Company and the Charleston and Western Carolina Railway Company, against the United States, to enjoin the enforcement of an order of the Interstate Commerce Commission which requires complainants to cancel certain restrictive schedules filed as amendments to joint tariffs theretofore filed with the Commission. The Commission has intervened in defense of its order, as have also the Piedmont and Northern Railway Company and the Georgia and Florida Railroad, who are interested in maintaining it. These various railroad companies are commonly referred to by the initial letters of their corporate names, and we shall so designate them in this opinion. The effect of the restrictive schedules which have been suspended and ordered cancelled by the Commission was to deny the

benefit of through routes and rates, which had been theretofore established, to shipments passing over the Greenwood extension of the G. & F. between Greenwood, S. C. and Augusta, Ga.

Complainants urge as justification of the restrictive schedules that the Carolina, Clinchfield and Ohio Railroad between Elkhorn, Ky. and Spartanburg, S. C., over which the through traffic in question moves, is operated under a common control with the A. C. L. and the L. & N. within the meaning of section 15(4) of the Interstate Commerce Act as amended by the Transportation Act of 1920 (49 U. S. C. A. 15(4)); that the C. & W. C., which is operated as a part of the A. C. L. system, has a line between Spartanburg, S. C. and Augusta, Ga.; and that to allow the P. & N. between Spartanburg and Greenwood and the G. & F. between Greenwood and Augusta to participate in the hauling of through traffic passing over the C. C. & O. under [fol. 166] the through routes and rates theretofore established is to require complainants without their consent to accept a short haul on such traffic in violation of the provisions of section 15(4). Defendants contend that complainants cannot invoke the provisions of section 15(4) because of conditions three and four imposed by the Commission and consented to by the A. C. L. and the L. & N. in their lease of the lines of the C. C. & O., by the terms of which it was stipulated that the line of the C. C. & O. should be maintained as an open route equally available to all connecting carriers. Complainants reply that a proper interpretation of the conditions of the lease does not require that they short haul themselves as to traffic passing over the C. C. & O. and that, if the conditions be so interpreted, it was beyond the power of the Commission to impose them.

The through routes and rates in question, 304 in number, were established by joint tariffs in which complainants, the P. & N. and the G. & F. participated, and which were filed prior to the completion of the Greenwood extension of the G. & F. between Greenwood and Augusta. They applied to traffic passing over the C. C. & O. between points at and beyond the Ohio River on the one hand and points in southeastern and Carolina territory on the other. Prior to the completion of the Greenwood extension, the natural course of this traffic between Spartanburg and Augusta was over

the lines of the C. & W. C. The Greenwood extension was completed and opened to traffic on June 1, 1929; and a route via the P. & N. from Spartanburg to Greenwood and via the G. & F. from Greenwood to Augusta thereupon became automatically available for this through traffic passing over the C. C. & O. under the through routes and rates [fol. 167] theretofore established. It was to exclude this route from the provisions of the tariffs establishing the through routes and rates that the restrictive schedules were filed by complainants. The Commission, acting under section 15(7) of the Interstate Commerce Act as amended by the Transportation Act of 1920 (49 U. S. C. A. 15(7)), suspended the operation of these restrictive schedules and after hearing ordered that they be cancelled as violative of conditions contained in the order authorizing the lease of the C. C. & O. by the A. C. L. and the L. & N. Condition one of the order approving the lease required the lessees to maintain a separate organization for operating the leased property. Conditions three and four, which are the ones of particular importance here, are as follows:

"3. So far as lies within the power of the applicants, existing routes and channels of trade and commerce heretofore established by other carriers in connection with the Clinchfield shall be preserved, existing gateways for the interchange of traffic with such other carriers shall be maintained, *and the present neutrality of handling traffic inbound and outbound by the Carolina, Clinchfield & Ohio Railway and its subsidiary, the Carolina, Clinchfield & Ohio Railway of South Carolina, shall be continued so as to permit equal opportunity for service and routing or movement of traffic which is competitive with traffic of the applicants, or either of them,* to and from all connecting lines reached by the line of the Clinchfield companies, without discrimination in service against such competitive traffic.

"4. The applicants shall permit the line of the Clinchfield and its subsidiaries to be used as a link for through traffic, via existing gateways of interchange, or via such gateways as may hereafter be established under authority of the commission by means of the connecting lines which the Louisville & Nashville Railroad Company proposes to build, equally available to such other carriers, now connecting, *or which may hereafter connect,* with the line of

the Clinchfield and its subsidiaries, as may desire to participate in through routes and joint rates between points in territory north and west of the line of the Clinchfield and points at and beyond the Ohio River on the one hand and points in the southeastern and Carolina territory on the other, under divisions to be agreed upon by the applicants, or either of them, and/or the Clinchfield organization, on the one hand, and by the other participating carrier or carriers on the other, *and shall not discriminate as* [fol. 168] *to rates, fares, and charges against such participating carrier or carriers as compared with the applicants, or either of them; the intention of this provision being that the line of the Clinchfield and its subsidiaries shall be maintained as an open route equally available to all carriers connecting with the Clinchfield for traffic between the points designated.*" (Italics ours.)

The A. C. L. owns fifty-one per cent of the L. & N. stock and controls its policy. The C. & W. C. is operated as a part of the A. C. L. system. The C. C. & O. is leased to the A. C. L. and L. & N. and is operated by officials appointed by them. It would seem clear, therefore, that the C. C. & O. is operated under a common control with the lines of complainants within the meaning of section 15(4) of the Interstate Commerce Act as amended by the Transportation Act of 1920, and that complainants would be entitled to the long haul on the traffic in question and to exclude the P. & N. and the G. & F. from participating therein, as they have sought to do by the restrictive schedules, unless they are precluded from so doing by the conditions of the C. C. & O. lease. Two questions arise, therefore, (1) whether the conditions of the lease require that the line of the C. C. & O. be maintained as an open route for this traffic, and (2) whether these conditions are valid and binding upon complainants. We think that both of these questions must be answered in the affirmative.

It is argued that condition three merely requires that the existing neutrality in the handling of traffic over the C. C. & O. be continued so as to preserve equal opportunity for service and routing and movement of traffic competitive with traffic of applicants via existing routes and gateways, without discrimination in service against such competitive traffic; and that condition four merely requires that the line of the C. C. & O. be maintained as an open route for the

[fol. 169] carriers then directly connecting therewith or, at the most, for carriers which might under the approval of the Commission be allowed to make such direct connection thereafter. We think, however, that this gives too narrow and restricted a meaning to the conditions. As thus interpreted, condition three would require nothing not already required by section 3(3) of the Interstate Commerce Act as amended by the Transportation Act of 1920 (49 U. S. C. A. 3(3)). And, as to condition four, it certainly could not have been intended to restrict the requirement of neutrality for the benefit of those roads having direct connection with the C. C. & O. when, as said by the Commission, the term connecting lines is commonly used "in referring to the lines in general making up a through route." The purpose of the conditions was to withhold from the lessees a partisan control of the C. C. & O. so that its line would remain available on equal terms to their competitors; and we think that this purpose was clearly expressed in the language of the conditions. The plain meaning of that language is that the existing neutrality of the C. C. & O. is to be continued "so as to permit equal opportunity for service and routing or movement which is competitive with traffic of applicants" and that the line of the C. C. & O. is to be maintained "as an open route equally available to all carriers connecting with the Clinchfield for traffic between the points designated."

When the lease was before the Commission the L. & N. urged that same be approved to enable it to relieve an intolerable car supply condition on certain of its lines. (90 I. C. C. 11.) The A. C. L. put forward the plea that it had no coal on its own rails and desired access over controlled lines to the coal fields of Kentucky and South-[fol. 170] western Virginia. (90 I. C. C. 122.) It was urged in addition that the opening of the new route which the lease would make available would enable the L. & N. to get into the western Carolinas in competition with the Southern and that sundry benefits would accrue to the entire territory affected as a result. (90 I. C. C. 127 and 128.) Those opposing the lease, including the G. & F., contended that its approval would destroy certain existing and potential routes, withdraw effective competition as to large areas reached by the A. C. L., and give the A. C. L. an undue advantage in transportation in the southeast. The G. & F.

objected on the specific ground that it intended to seek permission to build its Greenwood extension, and that, if the A. C. L. were permitted to lease the C. C. & O., this extension would be discriminated against in favor of the C. & W. C. by means of restrictions of joint rates. After considering all of these matters, the Commission summed up the situation as follows (90 I. C. C. 131-2):

"Because of its isolation and the policy of its connections in preferring the longer hauls by more circuitous routes, the Clinchfield is not rendering the service for which it was designed and of which it is capable. The testimony is that its influence on the rate structures of the Carolinas, where its maximum influence should be felt, is practically nothing, and that so long as it continues as an independent property its usefulness to the public will be circumscribed. Control of the Clinchfield by the applicants, when the proposed connections are made between the L. & N. and the Clinchfield, especially the connection with the Harlan County branch, should result in added competition among the coal operators serving the Carolina markets; should give the Carolina territory an additional source of fuel in times of emergency; and should result in added competition with the Southern for traffic between the Carolina territory and the Northwest, at least between the western portion of the Carolinas on the one hand, and Kentucky and points beyond the Ohio River, west of the Cincinnati-Benton Harbor line, on the other. Without some provision, however, for its use by other carriers as a link in through routes, control of the Clinchfield by the applicants would probably result in the abandonment of existing routes, especially the one via Elkhorn City and the [fol. 171] Chesapeake; and would doubtless result in placing the Seaboard and other carriers of the southeast at a disadvantage as compared with the Southern and Coast Line in competing for traffic between the northwest and certain sections of the southeast; * * *. Those opposing the lease urge that the interest of each of the interveners and of the public in general will be best served if the Clinchfield is maintained as an independent line supported by its connections at each end. They request that any approval of the proposed acquisition be under condition that the Clinchfield be maintained as an open route,

neutral or impartial, and equally available to all connections.".

The Commission then referred to its having sent out notices of proposed conditions of the lease and of having received representations from the interested parties with regard thereto, and announced the conclusion that approval and authorization of the lease would be in the public interest only under five conditions, to one, three and four of which we have already referred. With reference to conditions three and four, which are of special importance here, the Commission used this very pertinent language (90 I. C. C. 134):

"The applicants have protested vigorously against the imposition of conditions 3 and 4. We have considered fully their representations, however, and have reached the conclusion that without the observance of these conditions by the applicants we are unable to find that the proposed acquisition of control would be in the public interest."

In the light of this record, we think there can be no doubt of the correctness of the conclusion that the line of the C. C. & O. was to be continued as a neutral route and that in a case such as this roads handling through traffic passing over it were to be treated just as though the lease were not in existence and the C. C. & O. were an entirely independent road independently operated. Point is given to this conclusion when it is remembered that the G. & F. was one of the protestants at the time of the approval of the lease, and that one of the "potential" routes which it was sought [fol. 172] to save from destruction, and which the conditions of the lease were evidently inserted to save, was the route to be provided by the connection of the Greenwood extension with the P. & N. After the lease was approved, the Commission approved the building of the Greenwood extension by the G. & F. at a cost of $3,300,000. And, while we do not think that the A. C. L. is estopped from making its present contention by failing to protest when the G. & F. sought a certificate of public necessity and convenience for the building of this extension, the fact that it did not do so although invited to appear by the Commission is a pertinent matter for consideration in determining the meaning of the conditions under which the C. C. & O. lease was approved;

for only on the assumption that the extension was to participate in the through traffic passing over the C. C. & O. could the building of the extension be justified as a matter of public necessity and convenience. In authorizing the extension the Commission said:

"As an aid in securing better connections for the interchange of traffic it has been planned to extend the line from Augusta in a northerly direction to Greenwood, S. C., a distance of about 56 miles. By this extension connection would be effected with the Seaboard Air Line and the Piedmont & Northern, the latter a strong independent electric line. Through these connections the Georgia & Florida will have direct access to the very important traffic-producing territory of northern South Carolina and central North Carolina, known as the Piedmont district. Through the medium of the Piedmont & Northern, it will also have an advantageous connection with the Clinchfield Railroad at Spartanburg, S. C., and through this connection it expects to realize a substantial participation in the tonnage of coal and other commodities moving southbound over the Clinchfield destined to southern Georgia and Florida, and in the northbound movement of freight, principally citrus fruits and vegetables, from southern territory. The lines of the Southern Railway and the Charleston & Western Carolina, the latter a part of the Atlantic Coast Line system, also extend between Greenwood and Spartanburg, connecting with the Clinchfield, but as both of these lines have their own con- [fol. 173] nections to the south the Georgia & Florida must look principally to the Piedmont & Northern for its interchange with the Clinchfield." 117 I. C. C. 473, 475.

We agree with what was said by the Commission, in passing the order which we are asked to enjoin, where, in construing the conditions here under consideration, the following language was used:

"The respondents construe the conditions of the Clinchfield lease too narrowly. In authorizing that lease we said in reference to the Georgia & Florida and other opponents of the application:

Those opposing the lease urge that the interest of each of the interveners and of the public in general will be best

served if the Clinchfield is maintained as an independent line supported by its connections at each end. They request that any approval of the proposed acquisition be under condition that the Clinchfield be maintained as an open route, neutral or impartial, and equally available to all connections. They generally urge that unconditional approval of the application be refused.

"The conditions imposed, and accepted by the Coast Line and the L. & N., were intended to provide in substance for the advantages thus requested, and fairly construed should have that effect. Their purpose was to preserve the relationships then existing between the Clinchfield, on the one hand, and the public and connecting lines of railroad, on the other hand, which were the relationships usually and normally existing between independent railroads and those whom it serves. This purpose is clearly indicated by the language, particularly the closing portion of condition 3, reading:

The *present neutrality* of handling traffic inbound and outbound by the Carolina, Clinchfield & Ohio Railway and its subsidiary, the Carolina, Clinchfied & Ohio Railway of South Carolina, shall be continued so as to permit equal opportunity for service and routing or movement of traffic which is competitive with traffic of the applicants, or either of them, to and from *all connecting lines reached by the line of the Clinchfield* companies, without discrimination in service against such competitive traffic.

And by the corresponding portion of condition 4, reading:

The intention of this provision being that the line of the Clinchfield and its subsidiaries shall be maintained as an open route equally available to all carriers *connecting with the Clinchfield for traffic between the points designated.* (The points here referred to are points in territory north [fol. 174] of the Ohio and points in southeastern territory).

"While our immediate concern was to prevent the closing of any gateways and routes then existing, there was no thought of excluding such changes or additions as would further the general purpose. The proposed restriction of routing would not preserve the 'present neutrality' of the Clinchfield, but on the contrary would seriously impair it.

There can be no doubt that, as an independent carrier, the Clinchfield would welcome an additional competing route for the movement of its traffic to and from the territory served by the Georgia & Florida, and it is equally apparent that such a route would benefit the Georgia & Florida and the public it serves. There is no warrant for limiting and meaning of 'connecting lines' to the direct connections of the Clinchfield. The term is commonly used in referring to the lines in general making up a through route. There is in fact no other convenient term. The technical nature of this contention of respondents becomes apparent when it is considered that under their construction the conditions would necessarily apply to any extension of operations by the Piedmont, regardless of effect in short hauling the Coast Line." 165 I. C. C. 3.

For the reasons stated, we think there can be no question that the Commission was correct in its interpretation of the conditions of the C. C. & O. lease. The question remains as to whether it was within the power of the Commission to impose these conditions. We think that it was. Section 5(2) of the Interstate Commerce Act as amended by the Transportation Act of 1920 (41 Stat. 481, 49 USCA 5(2)) provides as follows:

"(2) *Acquisition of control of one carrier by another.* Whenever the commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this chapter, that the acquisition, to the extent indicated by the commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration *and on such terms and conditions as shall be found by the commission to be just and reasonable in the premises.*". (Last italics ours.)

[fol. 175] It will be noted that the Commission was authorized by the section quoted, to approve the acquisition by one carrier of the control of another by lease or other-

wise "on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises." It is not only the right but the duty of the Commission to impose such conditions as will make the acquisition in the public interest; for, unless the acquisition is found to be in the public interest, the Commission cannot authorize it. Chicago Junction Case 264 U. S. 258, 265. In this case the Commission found that the lease would not be in the public interest unless the conditions in question were imposed; and consequently without them the lease could not have been authorized. If they were beyond the power of the Commission, it results not that they are void and the lease unconditional, but that the lease itself is unauthorized. We think, however, that it was clearly within the power of the Commission to impose them.

Complainants rely upon the recent decision of the Supreme Court in U. S. v. Chicago, M., St. P. & P. R. Co. — U. S. —, 51 Sup. Ct. Rep. 159. That case, however, is not remotely in point. There the condition imposed related not to the control of interstate commerce, but to the disposition of a fund subscribed for a special purpose; and it was held that the condition was void because imposed without authority of law, in that it related to a contract which "was not one in respect of commerce but involved a transaction distinct and complete in itself without regard to its results; and, whether succeeded by commerce or not, was no part of it." Here the conditions relate directly to interstate commerce, prescribing how a line of railroad engaged in interstate commerce is to be operated with relation to other interstate carriers, and the [fol. 176] manner in which interstate traffic over such line is to be handled. Their effect was to authorize the acquisition of the C. C. & O. by the A. C. L. and the L. & N. in such way as to enable those roads to serve the purposes which they put forward as reasons for the acquisition and at the same time to preserve the independent status of the C. C. & O. for the benefit of the public and the protection of connecting carriers.

It is argued that as construed by the Commission, the conditions in question are violative of section 15(4) of the Interstate Commerce Act as amended by the Trans-

portation Act of 1920 (49 U. S. C. A. 15 (4)), in that they require the A. C. L. and the L. & N., without their consent, to embrace in through routes substantially less than the entire length of their lines and the lines of intermediate roads operated under a common management or control. The answer is that these carriers gave their consent to this when they accepted the C. C. & O. lease, one of the provisos of the order which approved the lease being as follows:

"That the making of said lease and exercise of any of the rights conferred by this order shall in all future proceedings, judicial as well as administrative, to which the carriers above named or any of them may be parties, be deemed and taken as conclusive evidence of their acceptance of, and agreement to abide by, the conditions enumerated in said report, and numbered from 1 to 5, inclusive."

It is argued that the Commission was without power to enter the order in question because it is said that the order was in effect the establishment of new and additional through routes without affording a hearing as required by section 15(3) of the Interstate Commerce Act as amended by the Transportation Act of 1920 (49 U. S. C. A. 15(3)). This point was made before the Commission and was sustained as to 33 of the 337 schedules originally involved, on the ground that these 33 schedules related to [fol. 177] tariffs to which the G. & F. was not a party. As pointed out by the Commission, however, it had jurisdiction as to the remaining 304 restrictive schedules because their purpose was to restrict the joint rates that would automatically become applicable over the Greenwood extension upon its completion without the filing of additional tariffs or further action by the Commission. These 304 restrictive schedules, therefore, affected existing rates, fares and charges applicable on traffic, to, from or over the G. & F. within the meaning of section 15(7) of the Interstate Commerce Act as amended by the Transportation Act of 1920 (49 U. S. C. A. 15(7)).

For the reasons stated, we think that the injunction prayed should be denied and that the motion to dismiss the bill of complaint should be allowed.

Bill dismissed.

(Signed) John J. Parker, U. S. Circuit Judge.

[fol. 178] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING INJUNCTION AND DISMISSING BILL OF COMPLAINT—March 9, 1931.

This cause coming on to be heard before the undersigned, constituting a special court of three judges convened according to statute to pass upon an application for an injunction to restrain the enforcement of an order of the Interstate Commerce Commission, and being heard upon the bill and answers and the evidence introduced before the Commission; and a motion having been made to dismiss the bill for lack of equity:

The Court finds the facts to be as set forth in the Report of the Commission, copy of which is attached to the bill; and the Court being of opinion, for the reasons set forth in the written opinion filed herewith, that complainants are not entitled to an injunction and that the bill is lacking in equity, it is ordered that the application for an injunction be denied and that the bill be dismissed at the cost of complainants.

This the 9 day of March, 1931.

John J. Parker, U. S. Circuit Judge, 4th Judicial Circuit. Elliott Northcott, U. S. Circuit Judge, 4th Judicial Circuit. H. H. Watkins, U. S. District Judge, Western District of South Carolina.

[fol. 179] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION TO CLARIFY OPINION—Filed April 4, 1931

To United States of America, Interstate Commerce Commission, Piedmont & Northern Railway Company, and Georgia and Florida Railroad Company and W. V. Griffin and H. W. Purvis, as its receivers:

You, and each of you, will please take notice that on the 23rd day of April, 1931, at ten o'clock A. M., or as soon thereafter as Counsel may be heard, at the Federal Court

Room at Charleston, South Carolina, Atlantic Coast Line Railroad Company, Louisville and Nashville Railroad Company, and Charleston & Western Carolina Railway Company, plaintiffs in the above entitled cause, will move the statutory court to clarify the opinion filed by it in this cause, in the manner and in accordance with the prayer of a petition then to be presented to said court, of which petition a copy is attached hereto.

(Signed) F. B. Grier, (Signed) M. G. McDonald,
(Signed) Carl H. Davis, Solicitors for Plaintiff.

April 2, 1931.

[fol. 180] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION TO CLARIFY OPINION—Filed April 4, 1931

To the Honorable John J. Parker, United States Circuit Judge; Elliott Northcott, United States Circuit Judge; H. H. Watkins, United States District Judge, constituting a statutory court in this case:

Plaintiffs in this case respectfully ask that this Court find specifically as a fact that at all times here involved the line of railroad of Charleston & Western Carolina Railway Company, one of the plaintiffs in this case, was operated in conjunction and under common management or control with the line of Atlantic Coast Line Railroad Company.

Plaintiffs aver that the record in this case supports no other inference than that such is a fact, and that the Commission so found; that notwithstanding such record and finding thereon, defendants, in their answers, deny such fact or that the Commission so found.

The opinion of the Court in this case is predicated upon, and by necessary inference finds, the fact that the line of the Charleston & Western Carolina Railway Company is operated in conjunction and under common management or control with the line of Atlantic Coast Line Railroad Company, and refers to the Charleston & Western Carolina Railway Company as a part of the Atlantic Coast Line system.

Plaintiffs are advised, however, that notwithstanding [fol. 181] this finding by the Court, at least one of the defendants is of opinion that the Court has not found that the line of the Charleston & Western Carolina Railway Company is operated in conjunction and under common management or control with the line of Atlantic Coast Line Railroad Company, and plaintiffs respectfully submit that if this issue is raised on appeal it will necessitate the printing of a considerable portion of the record that otherwise would be immaterial and conceivably could result in a ruling by the Supreme Court that although this Court may have erred in its construction of the conditions of the C. C. & O. Lease, no relief could be granted complainants because the Court failed to find whether or not the Charleston & Western Carolina Railway Company is operated in conjunction and under the common managements or control with the line of Atlantic Coast Line Railroad Company.

Plaintiffs respectfully submit that this is a material issue arising upon the pleadings and record in this case, and that a specific finding of this fact is essential to its proper determination, and made mandatory by the provisions of Equity Rule No. 70½.

Wherefore Plaintiffs respectfully pray that the Court, in order to put beyond question its finding as to this fact, specifically find that the Charleston & Western Carolina Railway Company is operated in conjunction and under common management or control with the line of Atlantic Coast Line Railroad Company.

(Signed) F. B. Grier, (Signed) M. G. McDonald,
(Signed) Carl H. Davis, Solicitors for Plaintiffs.

[fol. 182] In United States District Court

[Title omitted]

Order Denying Motion to Clarify Opinion

This cause coming on to be heard before the undersigned constituting a special court of three judges, convened according to statute, upon motion of complainants that the opinion heretofore filed be changed by striking out the following sentence appearing near the top of page 5 of the

opinion, namely: "The C. & W. C. is operated as a part of the A. C. L. system", and substituting in lieu thereof, "The C. & W. C. is operated in conjunction and under a common management or control with the line of the A. C. L. and as a part of the A. C. L. system"; and defendants appearing by counsel and not objecting to the change; but the Court being of opinion that the opinion as filed sufficiently covers the matter involved and that no change therein is necessary:

Now, therefore, it is ordered that the motion of complainants be and the same is hereby denied.

This the 23rd day of April, 1931.

(Signed) John J. Parker, United States Circuit Judge, Fourth Judicial Circuit. (Signed) Elliott Northcott, United States Circuit Judge, Fourth Judicial Circuit. (Signed) H. H. Watkins, United States District Judge, Western District of South Carolina.

[fol. 183] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR

Come now the said Atlantic Coast Line Railroad Company, Louisville and Nashville Railroad Company and Charleston & Western Carolina Railway Company, plaintiffs in the above-entitled cause, by counsel, and file the following assignment of errors upon which they will rely in the prosecution of their appeal to the Supreme Court of the United States from the final decree or order of the District Court entered in this cause on the 9th day of March, 1931.

The District Court erred:

1. In holding that by accepting the written conditions prescribed by the Commission in the Clinchfield Lease case (Finance Docket 3131, 90 I. C. C., 113, Exhibit 4) the Atlantic Coast Line Railroad Company, one of the lessees, thereby consented to the inclusion, in through routes which might thereafter be established, of substantially less than the entire length of its railroad and of intermediate rail-

roads operated in conjunction and under a common management or control therewith, lying between the termini of said through routes, within the meaning of paragraph 4 of section 15 of the Interstate Commerce Act.

2. In holding that by accepting the lease of the Clinchfield Railroad properties in 1924, Atlantic Coast Line Railroad Company, one of the joint lessees, thereby consented to be a party to future through routes not then in existence, and now made up of the leased line of the Clinchfield Railroad between Elkhorn City, Ky., and Spartanburg, S. C., the line of the Piedmont and Northern Railway between Spartanburg and Greenwood, S. C., and the extension of the line of the Georgia and Florida Railroad between Greenwood, S. C., and Augusta, Ga., completed June 1, 1929, which through routes short-haul the line of Atlantic Coast Line Railroad Company and the line of the Charleston & Western Carolina Railway Company, which is operated in conjunction and under a common management or control with the line of Atlantic Coast Line Railroad Company.

3. In holding that, in the light of the record in this case, "there can be no doubt of the correctness of the conclusion that the line of the C. C. & O. was to be continued as a neutral route and that, in a case such as this, roads handling through traffic passing over it were to be treated just as though the lease were not in existence and the C. C. & O. were an entirely independent road independently operated."

[fol. 184] 4. The Court erred in holding that the words "connecting lines reached by the lines of the Clinchfield companies", as used in Condition 3 in the lease case, mean lines in general making up a through route, although not directly connecting with or reached by the lines of the Clinchfield Companies.

5. In not holding that the words, "connecting lines reached by the lines of the Clinchfield Companies," as used in Condition 3 in the lease case, mean lines of railroad then in existence directly connecting with and reached by the lines of the Clinchfield Companies.

6. In holding that the acceptance by Atlantic Coast Line Railroad Company of the conditions prescribed by the

Commission in the Clinchfield Lease case requires the cancellation of the restrictive routing notes here involved.

7. In holding that the joint-rates here involved automatically became applicable over the newly completed extension of the line of the Georgia and Florida Railroad Company upon its completion in June, 1929.

8. In holding that, upon the opening to traffic on June 1, 1929, of the Greenwood extension from Augusta, Georgia, to Greenwood, South Carolina, a route via Piedmont and Northern from Spartanburg to Greenwood, South Carolina, and via the Georgia and Florida from Greenwood to Augusta, Georgia, "thereupon became automatically available for this through traffic passing over the Carolina, Clinchfield and Ohio under the through routes and rates theretofore established."

9. In holding that the failure of the Atlantic Coast Line Railroad Company to protest, in the year 1926, against the granting of a certificate of public convenience and necessity authorizing the construction of the Augusta to Greenwood extension of the Georgia & Florida Railroad Company, is a pertinent matter for consideration in determining the meaning of the conditions in the Clinchfield lease case.

10. In holding that it was within the statutory power of the Interstate Commerce Commission to prescribe in the Clinchfield lease case conditions requiring the lessees to waive as to future routes over railroads not then in existence, the protection afforded all carriers by railroad by paragraph 4 of section 15 of the Interstate Commerce Act.

11. In failing to find and hold that the suspension by the Interstate Commerce Commission of the restrictive routing notes here involved, which were duly published and filed prior to June 1, 1929, resulted in the establishment by the Interstate Commerce Commission of new and additional through routes contrary to, and without the hearing and the making of the findings required by section 15 (3) of the Interstate Commerce Act and in violation of the provisions of paragraph 4 of said section 15 of said Act.

12. In denying the injunction prayed for and dismissing the bill.

[fol. 185] Wherefore Plaintiffs pray that the said order may be reversed and for such other and further relief as to the Court may seem just and proper.

F. B. Grier, F. B. Grier, M. G. McDonald, M. G. McDonald, Carl H. Davis, Carl H. Davis, Solicitors for Plaintiffs.

Dated the 23rd day of April, 1931.

[fol. 186] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL

You are hereby notified that the plaintiffs in this cause, Atlantic Coast Line Railroad Company, Louisville and Nashville Railroad Company and Charleston & Western Carolina Railway Company, have taken an appeal to the Supreme Court of the United States from the final order or decree of the District Court of the United States for the Western District of South Carolina, dated March 9, 1931, in this case, in which they are plaintiffs and the United States of America, Interstate Commerce Commission, Piedmont and Northern Railway Company and Georgia and Florida Railroad Company and W. V. Griffin and H. W. Purvis, as its Receivers, are defendants, and that the order allowing the appeal makes the same returnable within thirty days from the 23rd day of April, 1931.

This notice is given to you pursuant to the Urgent Deficiencies Act of October 22nd, 1913.

F. B. Grier, M. C. McDonald, Carl H. Davis, Attorneys for Plaintiffs.

Service of the foregoing notice and the receipt of a copy thereof are hereby acknowledged this 30th day of April, 1931.

(Signed:) John M. Daniel, Attorney General, State of South Carolina.

[fol. 187] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT

To the Clerk of the above Court:

Please prepare a transcript of the record in the above-entitled cause, in the matter of the appeal of Atlantic Coast Line Railroad Company, Louisville and Nashville Railroad Company and Charleston & Western Carolina Railway Company, plaintiffs, and include therein in the order given below, the following matter:

1. Order as to subpœna.
2. Bill of Complaint and exhibits attached thereto.
3. Answer of the United States.
4. Intervention and Answer of the Interstate Commerce Commission.
5. Intervention and answer of Piedmont and Northern Railway Company.
6. Intervention and Answer of Georgia and Florida Railroad and its Receivers.
7. Order assigning case for hearing on the 23rd day of January, 1931.
8. Opinion and Final Decree of District Court dated March 9, 1931.
9. Petition for clarification of opinion.
10. Order on petition for clarification of Opinion.
11. Petition for Appeal.
12. Assignment of Errors.
13. Order Allowing Appeal.
14. Bond.
15. Citation.
16. Notice to Attorney General of the State of South Carolina.
17. Præcipe for Record.

[fol. 188] F. B. Grier, M. G. McDonald, Carl H. Davis, Solicitors for Plaintiffs.

Service of the foregoing Præcipe for Transcript and receipt of a copy thereof are hereby acknowledged this 23rd day of April, 1931.

Elmer B. Collins, Solicitor for United States. H. L. Underwood, Solicitor for Interstate Commerce Commission. W. S. O'B. Robinson, Jr., Solicitor for Piedmont and Northern Railway Company. J. J. Willingham, Hull, Barrett & Willingham, Solicitor for Georgia and Florida Railroad and Its Receivers.

[fol. 189] IN UNITED STATES DISTRICT COURT

MEMORANDUM

(1) Petition for appeal filed 23 day of April, 1931.

(2) Appeal allowed 23 day of April, 1931.

(3) Copy of order allowing appeal lodged for adverse parties 4 day of May, 1931.

(4) Appeal bond, dated 23 day of April, 1931.

Penalty: $500.00.

Obligors: Atlantic Coast Line Railroad Company, Principal; Fidelity & Deposit Co. of Maryland, Surety.

Conditioned for costs.

(5) Citation, dated 23 day of April, 1931; Acceptance of Service dated April 23, 1931.

[fol. 190] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed April 23, 1931

To the Honorable H. H. Watkins, judge of said court:

Atlantic Coast Line Railroad Company, Louisville and Nashville Railroad Company and Charleston & Western Carolina Railway Company, plaintiffs, feeling themselves aggrieved by the final order or decree of the District Court of the United States for the Western District of South Carolina, entered in this cause on March 9, 1931, denying an injunction against the order of the Interstate

Commerce Commission, here involved, and dismissing the bill, pray an appeal therefrom to the Supreme Court of the United States. The particulars wherein they consider the final order or decree erroneous are set forth in the Assignment of Errors which accompanies this Petition, and to which reference is made.

Wherefore, said plaintiffs pray that an appeal be allowed, that proper security for costs be fixed and taken; that the requisite citation be signed and issued as provided by law and that a transcript of the record, proceedings, and papers on which the final order or decree was made and entered, duly authenticated, be transmitted forthwith to the Supreme Court of the United States.

F. B. Grier, F. B. Grier, M. G. McDonald, M. G. McDonald, Carl H. Davis, Carl H. Davis, Attorneys for Plaintiffs-Petitioners.

Dated the 23rd day of April, 1931.

[fol. 190½] [File endorsement omitted.]

[fol. 191] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed April 23, 1931

In the above-entitled cause, Atlantic Coast Line Railroad Company, Louisville and Nashville Railroad Company and Charleston & Western Carolina Railway Company, plaintiffs, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final order or decree of the District Court of the United States for the Western District of South Carolina in this cause, dated March 9th, 1931, and having also made and filed an assignment of errors and having in all respects conformed to the statutes and rules of the Court in such case made and provided:

It is ordered and decreed that the appeal be and the same hereby is allowed as prayed and made returnable within thirty (30) days from the date hereof, upon the filing of a bond by the plaintiffs, or either of them, in the

sum of Five Hundred Dollars ($500.00), with good and sufficient surety and conditioned according to law. The Clerk is directed to transmit forthwith a properly authenticated transcript of the record, proceedings, and papers upon which the order or decree was made and entered to the Supreme Court of the United States.

H. H. Watkins, United States District Judge.

Dated the 23rd day of April, 1931.

[fol. 191½] [File endorsement omitted.]

[fols. 192 & 192½] Bond on appeal for $500, approved and filed April 23, 1931, omitted in printing.

[fols. 193-194½] Citation, in usual form, showing service on Elmer B. Collins and others, omitted in printing.

[fol. 195] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 196] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS ON BEHALF OF APPELLANTS AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed May 27, 1931

Come now appellants, by counsel, and in accordance with Rule 13 (9) of this Court state that they intend to rely on the following points:

1. The Court erred in holding that the Atlantic Coast Line Railroad Company, one of the joint lessees in the Clinchfield lease case, by accepting in 1924 the lease there found to be in the public interest, subject to Conditions 3 and 4, thereby consented, within the meaning of 15 (4) of the Interstate Commerce Act, to the indiscriminate future short-hauling of its own and its system lines, over through

routes not then in existence nor physically possible. (Applicable to Assignment of Errors 1, 2, 3 and 12.)

2. The Court erred in holding that the words "connecting lines reached by the lines of the Clinchfield companies", as used in Condition 3 of the lease case, mean lines in general making up a through route thereafter to be established, and refer to lines of railroad not then physically connecting nor in existence. (Applicable to Assignment of Errors 4 and 5.)

3. The Court erred in holding that it was within the statutory power of the Interstate Commerce Commission to prescribe in the Clinchfield lease case conditions requiring the lessees to waive as to future routes over lines of railroad not then in existence the protection afforded all carriers by railroad by paragraph 4 of Section 15 of the Interstate Commerce Act. (Applicable to Assignment of Error 10.)

4. The Court erred in holding that the failure of the Atlantic Coast Line to protest in the year 1926 against the granting of a certificate of public convenience and necessity authorizing construction of the Augusta-Greenwood extension of the Georgia and Florida Railroad, is a pertinent matter for consideration in determining the meaning of the conditions of the Clinchfield lease case imposed in 1924. (Applicable to Assignment of Error 9.)

5. The Court erred in holding that the acceptance by the Atlantic Coast Line of the conditions prescribed in the Clinchfield lease case required cancellation of the restrictive routing notes involved. (Applicable to Assignment of Errors 6 and 12.)

[fol. 197] 6. The completion, on June 1, 1929, of the Augusta-Greenwood extension of the line of the Georgia and Florida Railroad made physically possible for the first time a through route over said extension of Georgia and Florida Railroad from Augusta, Georgia, to Greenwood, S. C., thence Piedmont & Northern Railway Company from Greenwood to Spartanburg, South Carolina, and thence over the railroad of Clinchfield Railroad Company from Spartanburg, South Carolina, and in the reverse direction, practically parallel to and slightly longer than the existing line of the Charleston & Western Carolina Railway Com-

pany between Spartanburg and Augusta. The publication of the restrictive routing notes before the extension was opened was intended to prevent and did prevent the opening of this Piedmont and Northern-Georgia and Florida route in connection with the line of Atlantic Coast Line Railroad Company, Clinchfield Railroad Company and Charleston & Western Carolina Railway Company. The cancellation of the restrictive routing notes by the Commission opened the routes without a hearing and the necessary findings required by paragraph 3 of Section 15 of the Interstate Commerce Act. (Covered by Errors 7 and 8.)

Appellants state that the entire record is necessary for the consideration of these points.

F. B. Grier, F. B. Grier, M. G. McDonald, M. G. McDonald, Carl H. Davis, Carl H. Davis, Solicitors for Appellants.

Wilmington, N. C., May 26, 1931.

[fol. 198] Due and legal service of Statement of Points on behalf of appellants and designation of parts of record to be printed, in the above cause, and receipt of a copy thereof is hereby acknowledged this 27th day of May, 1931.

John Lord O'Brian, The Assistant to the Attorney General, Solicitor for United States of America. H. L. Underwood, Solicitor for Interstate Commerce Commission. —— ——, Solicitor for Piedmont and Northern Railway Company. —— ——, Solicitor for Georgia and Florida Railroad and W. V. Griffin and H. W. Purvis as Its Receivers.

[fols. 199 & 200] Due and legal service of Statement of Points on behalf of appellants and designation of parts of record to be printed, in the above cause, and receipt of a copy thereof is hereby acknowledged this 27th day of May, 1931.

—— ——, Solicitor for United States of America. —— ——, Solicitor for Interstate Commerce Commission. Wm. B. Robinson, Jr., Solicitor for Piedmont and Northern Railway Company. —— ——, Solicitor for Georgia and Florida Railroad and W. V. Griffin and H. W. Purvis as Its Receivers.

Endorsed on cover: File No. 35,894. W. South Carolina D. C. U. S. Term No. 88. Atlantic Coast Line Railroad Company, Louisville and Nashville Railroad Company, and Charleston & Western Carolina Railway Company, appellants, vs. The United States of America, Interstate Commerce Commission, et al. Filed May 18, 1931. File No. 35,894.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. [redacted] 88

ATLANTIC COAST LINE RAILROAD COMPANY, ET ALS.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, ET ALS.,

Appellees.

STATEMENT OF JURISDICTION.

F. B. GRIER,
M. G. MCDONALD,
CARL H. DAVIS,
Solicitors for Appellants.

J&B-14959

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1930.

No. 972.

ATLANTIC COAST LINE RAILROAD COMPANY, ET ALS.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, ET ALS.,

Appellees.

STATEMENT OF JURISDICTION.

Appellants, in accordance with the requirements of Rule 12, show the following as the basis of the jurisdiction of this Court to review on appeal the decree below.

A—STATUTES.

Jurisdiction of this Court rests on the Urgent Deficiencies Act of October 22, 1913 (Chap. 32, 38 Stat. L. 219, 220, U. S. Code Title 28, Sec. 47a), and on Subsection 4 of Section 238 of the Judicial Code, as amended by the Act of February 13, 1925 (C. 229, 43 Stat. 936, 938., U. S. Code, Title 28, Sec. 345).

B—DECREE.

The decree sought to be reviewed was entered on the 9th day of March, 1931 (R. 164). Application for appeal was presented and the order allowing the appeal was entered on April 23, 1931 (R. 191). Cita-

tion was that day issued and service acknowledged (R. 192). The cause was docketed in this Court on May 18, 1931.

C—Nature of Case and of Rulings Below.

This suit was brought (R. 3) to enjoin an order of the Interstate Commerce Commission entered by it on the 9th day of June, 1930, in Investigation & Suspension Docket 3290, 165 I. C. C., 3 (R. 20). By this order the respondents there, appellants here, were notified and required to cancel the restrictive routing schedules which had theretofore been duly published by or for them, the Commission holding that the restrictions would be in violation of the conditions of the *Clinchfield Lease Case* (90 I. C. C. 113, R. 82). By the final decree entered by the specially constituted District Court the injunction was denied and the bill dismissed (R. 164).

D—Cases Relied On.

Cases which sustain the jurisdiction of this Court to review said decree are as follows:

United States v. Chicago, Milwaukee, St. Paul & Pacific Ry. Co., 282 U. S., 311.

St. Louis & O'Fallon Ry. Co. v. United States, 279 U. S., 461.

Baltimore & Ohio R. Co. v. United States, 277 U. S., 291.

Brimstone R. & Canal Co. v. United States, 276 U. S., 104.

United States v. Berwind-White Coal Mining Co., 274 U. S., 564.

Virginian Ry. Co. v. United States, 272 U. S., 658.
United States v. New York Central R. Co., 272 U. S., 457.
Western Chemical Co. v. United States, 271 U. S., 268.

Respectfully submitted,

F. B. GRIER,
M. G. MCDONALD,
CARL H. DAVIS,
Solicitors for Appellants.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 88.

Atlantic Coast Line Railroad Company,
Louisville and Nashville Railroad Company, and
Charleston & Western Carolina Railway Company,
Appellants,

vs.

The United States of America,
Interstate Commerce Commission, et al.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

BRIEF FOR APPELLANTS.

F. B. GRIER,
M. G. MCDONALD,
CARL H. DAVIS,
Solicitors for Appellants.

Wilmington, N. C.,
October 26, 1931.

J&B-14959

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IN THE

Supreme Court of the United States

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The United States of America,
Interstate Commerce Commission, et al.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

BRIEF FOR APPELLANTS.

MAY IT PLEASE THE COURT:

This case is an appeal from an order of the Court below entered in the above entitled cause on the 9th day of March, 1931. The suit in which the appeal is taken was brought by Atlantic Coast Line Railroad Company, Louisville and Nashville Railroad Company, and Charleston & Western Carolina Railway Company, as Plaintiffs, against the United States of America, Defendant, to enjoin, annul and set aside an order of the Interstate Commerce Commission entered on the 9th day of June, 1930, which requires

the Plaintiffs-Appellants to cancel certain restrictive schedules filed as amendments to joint tariffs theretofore filed with the Interstate Commerce Commission, because these restrictive schedules were held to be violative of certain conditions imposed by the Commission in the lease of the Clinchfield to Atlantic Coast Line and Louisville and Nashville. The Interstate Commerce Commission, Piedmont and Northern Railway Company, and Georgia and Florida Railway intervened as Defendants. The case was tried in the court below by three judges sitting as a District Court (U. S. C. Title 28, Sec. 47; C. 32, 38 Stat. 219, 220) and is here on a direct appeal from the order of that court refusing to enjoin the order of the Commission and dismissing the Bill of Complaint (U. S. C. Title 28, Sec. 345; C. 229, 43 Stat. 936, 938).

OPINION BELOW.

The opinion below is reported in 48 Fed. (2nd), p. 239.

JURISDICTION.

Jurisdiction of this Court to review on appeal the decree of the District Court entered in this case is as set out in Statement of Jurisdiction heretofore filed herein in accordance with Rule 12 of this Court.

STATEMENT OF THE CASE.

The Atlantic Coast Line owns 596,700 shares of the capital stock of the Louisville and Nashville, or about 51 per cent of the stock issued and outstanding. The Atlantic Coast Line controls the Louisville and Nashville by electing the Board of Directors of the latter, who in turn elect the officers (R. 23).

The Clinchfield Lease.

On July 20, 1923, Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company filed their application, under Paragraph 2 of Section 5 of the Interstate Commerce Act, for authority to acquire control by lease, for 999 years, of the property, rights and franchises of the Carolina, Clinchfield & Ohio Railway, and its subsidiaries, extending from Spartanburg, South Carolina, to Elkhorn City, Kentucky, a distance of 276.85 miles. A map showing the location of the railroads here involved was filed as Exhibit 2 with the bill in this case (R. 34-A). The Seaboard Air Line Railway Company, Georgia and Florida Railway, and Piedmont and Northern Railway Company intervened and opposed the granting of the lease. Hearing was had on the application and evidence introduced on September 24-29, 1923, inclusive (R. 69).

While the Commission was considering the matter, Chairman Hall, for the Commission, on February 9, 1924, addressed to all of the parties a letter suggesting ten conditions, and asking for a statement by the parties of their respective positions with reference thereto (R. 90). Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company filed their reply, which is made Exhibit 3 with the bill in this case, and set out in detail their position as to the various conditions (R. 35-67).

Of the ten conditions proposed by Chairman Hall, only five were subsequently adopted and imposed. Conditions 5, 6, 8, 9 and 10, as proposed by Chairman Hall, were eliminated. Conditions 1, 2, 3 and 4 were changed and adopted. Condition 7 was not objected to and was adopted and is now Condition 5. Condition

2, as adopted, deals with the proposed connection between the Clinchfield and Louisville and Nashville, and is not here involved. Condition 5 deals with the issuance of securities and is not here involved. The only conditions here involved are Conditions 1, 3 and 4 as adopted. The report and order of the Commission and the decision of the District Court here appealed from both turn on the proper construction to be placed on Conditions 3 and 4.

On June 3, 1924, the Commission, by its report and order in the Clinchfield lease case (R. 67-100), found that "the major public interest involved in the proposed acquisition and control of the Clinchfield lies in its utilization as a link in a new through route between the Southeast and the Northwest" (R. 83); that "because of its isolation and the policy of its connections in preferring their longer hauls by more circuitous routes, the Clinchfield is not rendering the service for which it was designed and of which it is capable;" and that "so long as it continues as an independent property its usefulness to the public will be circumscribed" (R. 89); and granted the application for control by lease of the Clinchfield as being in the public interest, subject to the five conditions referred to above and appearing in its report in the lease case (R. 91-92).

On the 16th day of October, 1924, Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company, pursuant to the order of the Commission, jointly leased the property known as the Clinchfield, together with its rights and franchises, and proceeded to enter upon the operation of same in accordance with the terms of the lease.

No route existing at the time of the lease has been closed or attempted to be closed (R. 20).

In order to provide the new through route, which the Commission stated was "the major public interest involved" in the Clinchfield lease, the Charleston & Western Carolina has expended large sums of money for the purpose of putting its line in condition to move through traffic received by it from other lines of the Coast Line system (R. 17), and the Louisville and Nashville Railroad Company has completed the construction of the new line through the mountains of Southwestern Virginia, necessary to connect its line with that of the Clinchfield (R. 18). The estimated cost of this latter construction was shown in applicant's reply to Chairman Hall's letter to be at least $6,000,000.00.

The Georgia and Florida Extension.

In December, 1926, two years after the making of the Clinchfield lease, the Interstate Commerce Commission by its order entered in the matter of Reorganization and Extension of the Georgia and Florida Railway (117 I. C. C. 473), authorized the construction by the reorganized company, Georgia and Florida Railway, of an extension of its line of railroad from its northern terminus at Augusta, Georgia, to Greenwood, South Carolina, a distance of fifty-nine miles. This new line is known as the Greenwood Extension, and was first opened for operation June 1, 1929. At Greenwood, South Carolina, it connects with the Seaboard Air Line, the Charleston & Western Carolina and also with the Piedmont and Northern. The Pied-

mont and Northern is an electrically operated railroad extending in a northerly direction from Greenwood, South Carolina, to Spartanburg, South Carolina, a distance of eighty-nine miles, where, at the time of the lease, it connected and now connects with the Clinchfield (R. 17).

Prior to the opening of the Greenwood Extension, there were in existence and in constant use through routes between points in the Northwest and Southeast over the lines of the Clinchfield, Charleston & Western Carolina and Atlantic Coast Line for southbound movement, and also in the reverse direction. There was no direct line of railroad in existence between Augusta, Georgia, and Greenwood, South Carolina, except the line of the Charleston & Western Carolina, and the routes here involved over the extension were not then physically possible.

Prior to the opening of said Greenwood Extension, the Charleston & Western Carolina and the Coast Line and Louisville and Nashville as joint lessees of the Clinchfield Railroad, and those roads as joint lessees of the line known as Georgia Railroad, filed in applicable tariffs restrictive routing notes, to become effective on May 20, 1929, and later dates (R. 14), and designed to restrict the application of joint rates theretofore published, so that same should not become applicable over the newly constructed line of the Georgia and Florida when same should be opened for business on June 1, 1929, and so as to preserve the long-haul of appellants by preventing the diversion from their system lines of traffic which had theretofore been moving over said lines (R. 15).

The Order of the Commission and the Decree of the District Court in the Instant Case.

Upon protest filed by the Georgia and Florida and Piedmont and Northern, the Commission suspended the restrictive routing notes (R. 14), and after a hearing the Commission by the order here sought to be enjoined, and for the reason set out in its report, required the respondents there (appellants here) to cancel the restrictive notes, upon the ground that the same were in violation of Conditions 3 and 4 of the Clinchfield lease (R. 30-33).

The Commission found in this case, and the District Court approves the finding, that the railroads of the Clinchfield and the Charleston & Western Carolina were and are operated in conjunction and under common management or control with the railroad of the Atlantic Coast Line Railroad Company, and that to the extent that traffic may move over the Greenwood Extension and Piedmont and Northern to Spartanburg, and thence over the Clinchfield, and the reverse, the Charleston & Western Carolina will be short-hauled if the proposed restrictions are required to be cancelled (R. 26, 149-150). No question of undue circuity is involved (R. 17). No emergency exists.

The Commission in the instant case holds that the purpose of the conditions imposed by it in the lease case was "to preserve the relationships then existing between the Clinchfield, on the one hand, and the public and connecting lines of railroad, on the other hand, which were the relationships usually and normally existing between *independent railroads* and those whom it serves" (R. 28-29).

The District Court, in its opinion, holds that the purpose of the conditions was to require that the leased line be continued "as a neutral route and that in a case such as this roads handling through traffic passing over it were to be treated *just as though the lease were not in existence* and the Carolina, Clinchfield & Ohio were an entirely *independent road independently operated*" (R. 141.) (Italics ours.)

Both the Commission and the District Court base their decision on their construction of Conditions 3 and 4 of the Clinchfield lease case and hold that the conditions were intended to and did require the waiver of the provisions of Section 15 (4) of the Act and that acceptance of the lease with these conditions amounts to consent by the Atlantic Coast Line to the short-hauling of its system lines over routes thereafter to be established over a line of railroad not then in existence, and not now connecting with or reached by the line of the Clinchfield. Unless the acceptance of the lease subject to these conditions amounts to consent, there is no consent (R. 145-146).

The Court also held that although the failure of the Coast Line in 1926 to appear in the Georgia and Florida Reorganization Case and protest against the construction of the extension there authorized, does not estop the Coast Line from now asserting its rights; nevertheless, such failure to appear "is a pertinent matter for consideration in determining the meaning of the conditions under which the Carolina, Clinchfield & Ohio lease was approved" (R. 141); and that the order of the Commission in this case did not amount to the establishment of new through routes in a manner contrary to the provisions of Paragraph 3 of Section 15 of the Act.

SUMMARY OF ARGUMENT.

I.

The Conditions in the Clinchfield Lease Case Were Accepted by the Lessees in Good Faith. Properly Construed, These Conditions Do Not Require the Cancellation of the Restrictive Notes Here Involved. Their Acceptance Did Not Constitute Consent by the Atlantic Coast Line Railroad Company to the Future Short-Hauling of its System Lines by Routes Thereafter to be Established Over a Line of Railroad Not Then in Existence, and Not Now Connecting With or Reached by the Line of the Clinchfield.

(This Covers Assignments 1, 2, 3, 4, 5, 6, and 12, and Points 1, 2, and 5.)

II.

As Construed by the Commission, and the District Court, Conditions 3 and 4 are in Conflict with the Findings in the Lease Case and with the Standards of the Act and are Beyond the Power of the Commission to Impose.

(This Covers Assignment 10, and Point 3.)

III.

The Failure of Atlantic Coast Line Railroad Company to Intervene, in 1926, in the Georgia and Florida Construction Case, then Pending Before the Commission, Should Not be Considered in Determining the Meaning of the Clinchfield Conditions Imposed in 1924.

(This Covers Assignment 9, and Point 4.)

IV.

The Order of the Commission, in this Case, Requiring the Cancellation of the Restrictive Routing Notes, was, in Effect, an Order Requiring the Opening of New Through Routes Without the Finding of Public Interest Required by Paragraph 3 of Section 15 of the Act.

(This Covers Assignments 7, 8, and 11, and Point 6.)

ASSIGNMENTS OF ERROR.

All the Assignments of Error (R. 150-153) are to be argued.

STATUTES RELIED ON.

The Statutes here involved are Paragraph 3 of Section 3; Paragraphs 2, 3 and 4 of Section 5; Paragraphs 3, 4 and 7 of Section 15 of the Interstate Commerce Act, and are set out in the Appendix hereto.

ARGUMENT.

I.

The Conditions in the Clinchfield Lease Case Were Accepted by the Lessees in Good Faith. Properly Construed, These Conditions Do Not Require the Cancellation of the Restrictive Notes Here Involved. Their Acceptance Did Not Constitute Consent by the Atlantic Coast Line Railroad Company to the Future Short-Hauling of its System Lines by Routes Thereafter to be Established Over a Line of Railroad Not Then in Existence, and Not Now Connecting With or Reached by the Line of the Clinchfield.

The determinative question in this case may be stated as follows:

Did the acceptance of Conditions 3 and 4 constitute a waiver by the appellants of the protection afforded them under the provisions of Section 15 (4) of the Act to Regulate Commerce, and constitute consent on the part of the Atlantic Coast Line Railroad Company that its system lines should be short-hauled as required by the report and order of the Commission and the decree of the District Court entered in this case, over future routes over a line of railroad not then in existence and not now connecting with nor reached by the lines of the Clinchfield?

In order to answer the question the Court must construe Conditions 3 and 4 of the Clinchfield lease case. The report and order of the Commission, and the decree of the District Court in the instant case both turn on the construction of these conditions. The determination of the meaning of these two conditions,

as applied to the facts of this case, will decide the controlling issue in this appeal. The conditions are in writing and the determination of the meaning of the language is a pure question of law.

In the case of *Great Northern R. Co. vs. Merchants Elevator Company*, 259 U. S., 285, the Court said:

> "When the words of a written instrument are used in their ordinary meaning, their construction presents a question solely of law. (291.)
>
> "Here no fact, evidential or ultimate, is in controversy; and there is no occasion for the exercise of administrative discretion. The task to be performed is to determine the meaning of words of the tariff which were used in their ordinary sense, and to apply that meaning to the undisputed facts. That operation was solely one of construction; and preliminary resort to the Commission was, therefore, unnecessary." (294.)

In *United States vs. Chicago, Milwaukee, etc., R. Co.*, 282 U. S., 311, the Court said:

> "The power to impose such conditions, however, is not unlimited and may not be exercised arbitrarily, or (since Congress cannot delegate any part of its legislative power except under the limitation of a prescribed standard—*Union Bridge Co. vs. United States*, 204 U. S., 364, 384-385) unless there be found substantial warrant for the conditions in the applicable standards established by the provisions of the Act relating to such securities."

The Five Conditions as Imposed by the Commission.

When the report in the lease case was made public, the applicants had to construe the five conditions (R. 91-92) which, as adopted, they had never up to that time seen, and decide whether they would accept the

lease. They had shown in their reply to Chairman Hall that they expected to set up with respect to the leased line an operating organization similar to that which they already had in effect with reference to the road between Augusta and Atlanta, Georgia, leased by them and known as the Georgia Railroad (R. 38). They therefore could accept Condition 1, which required a separate operating organization with reference to the Clinchfield. They had based their case on the necessity of the new through route which could be furnished only by constructing a line or lines between the leased line in Southwestern Virginia and the lines of the Louisville and Nashville beyond the mountains in Eastern Kentucky. They therefore had no objection to Condition 2 requiring such construction.

Condition 3. They knew that the Clinchfield was already a party to certain existing routes and that some business had moved in the past over the Clinchfield via these routes (R. 86). Their application was to lease the Clinchfield, and this involved leasing the Clinchfield in the condition in which it was at the time of the lease, with certain routes in existence. They had no purpose to discriminate in service against the traffic of connecting lines reached by the lines of the Clinchfield and moving over the leased line in such through routes after the lease was effective. They therefore could accept Condition 3, which required that there should be no such discrimination.

Condition 4. They were able to approximate the effect of the maintenance of routes via the carriers then connecting with the Clinchfield and to determine whether they could afford to accept the lease with the requirement in the lease that the said routes be main-

tained. They were therefore able to appraise the effect of and to accept Condition 4, which required the maintenance of these routes.

Condition 5 dealt with the issuance of securities, and was not objectionable.

Applicants accepted the lease subject to the conditions as imposed. This acceptance was in good faith. They are bound only by what those conditions mean, when properly construed. The conditions must be construed as consistent with the Interstate Commerce Act and with the control which was authorized.

The outstanding fact in the lease case is that the Commission authorized the acquisition by applicants there of *control* of the lines of the Clinchfield because the new through route thus alone made possible was "the major public interest involved" (R. 83) and because the Clinchfield was "not rendering the service for which it was designed and of which it is capable," and, "so long as it continues as an independent property its usefulness to the public will be circumscribed" (R. 89).

No construction of the conditions is proper in this case which negatives the control there found to be in the public interest.

Condition 1.

This condition requires the maintenance of a separate operating organization for the leased lines (R. 91). The Piedmont & Northern and Georgia & Florida argued before the Commsision in this case that Condition 1 was designed to require the waiver of the short-hauling provision of Paragraph 4 of Section 15 of

the Act, and that this condition made unlawful the restrictive notes here involved (R. 21). Manifestly, a condition requiring only a separate operating organization such as has been set up by the applicants in connection with the leased property (R. 23) could not be twisted into a consent to the indiscriminate future short-hauling here involved. Neither the Commission nor the District Court was impressed with the argument and based their findings on the construction of Conditions 3 and 4, from which alone the Commission quoted in stating its reasons for its conclusions in this case (R. 29). It is confidently submitted that Condition 1 has no bearing on this case.

Condition 3, as Proposed.

This condition, *as proposed* by Chairman Hall, in his letter of February 9, 1924, was in the following language:

> "(3) Existing routes and channels of trade and commerce heretofore established by other carriers in connection with the Clinchfield shall be preserved, existing gateways for the interchange of traffic with such other carriers shall be maintained, and the present neutrality of handling traffic inbound and outbound by the Carolina, Clinchfield & Ohio Railway and its subsidiary, the Carolina, Clinchfield & Ohio Railway of South Carolina, shall be continued so as to permit equal opportunity for service to and from all connecting lines reached by the line of the Clinchfield Companies *without discrimination as to routing or movement of traffic which is competitive with traffic of the applicants*, or either of them, and without discrimination against such competitive traffic in arrangement of schedule." (Italics ours.)

The objections of the applicants to this condition, and Condition 4, as proposed, are fully set out in their reply to Chairman Hall, which appears in the record, Pages 53-54. The principal objection lay in the requirement in the proposed condition that the applicants should afford equal opportunity for service to and from all connecting lines reached by the Clinchfield "*without discrimination as to routing or movement of traffic which is competitive with the traffic of the applicants.*" The applicants stated that this condition so phrased might require of them a waiver of the protection afforded applicants by Section 15 (4) of the Act against short-hauling of their system lines (R. 53-54.) (Italics ours.)

Condition 3, as Adopted.

The condition was changed and re-written. The phrase "without discrimination as to routing" was eliminated and the phrase "without discrimination in service" was added, so that, as set out in the order of the Commission, and as accepted by the applicants, Condition 3, *as adopted*, reads as follows:

> "3. So far as lies within the power of the applicants, existing routes and channels of trade and commerce heretofore established by other carriers in connection with the Clinchfield shall be preserved, existing gateways for the interchange of traffic with such other carriers shall be maintained, and the present neutrality of handling traffic inbound and outbound by the Carolina, Clinchfield & Ohio Railway and its subsidiary, the Carolina, Clinchfield & Ohio Railway of South Carolina, shall be continued *so as to permit* equal opportunity for service and routing or movement of traffic which is competitive with traffic of the

applicants, or either of them, to and from all connecting lines reached by the line of the Clinchfield companies, *without discrimination in service against such competitive traffic.*" (Italics ours.)

The condition, as changed and re-written, met the principal objection of the applicants to Condition 3 as proposed.

Appellants' Construction of Condition 3.

Paragraph 3 of Section 3 of the Interstate Commerce Act reads as follows:

"(3). All carriers, engaged in the transportation of passengers or property, subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper."

When this is read alongside Condition 3 it is impossible to escape the conclusion that Condition 3 of the lease case and Paragraph 3 of Section 3 of the Act deal with kindred subjects. The words "so as to permit" in Condition 3 show the purpose of the condition. In the re-writing of the condition by the Commission, the words added are "without discrimination in service." With this change in the condition, and with the reference to existing routes and their

use by competitors of the Coast Line, appellants construe Condition 3 as requiring that after the lease is effective there shall be no discrimination in service by the lessees in handling over the leased line via routes and gateways existing in 1924, the competitive traffic of connecting lines reached by the lines of the Clinchfield and moving over such routes.

This construction of the condition makes it in consonance with the control authorized, which was the control of the Clinchfield in the condition in which it then was, as a party to certain routes then in existence over its lines, which routes were used at times by lines connecting with the Clinchfield and competing with the Atlantic Coast Line (R. 86). Applicants by accepting the condition, agreed that they would not discriminate in service against such use of the leased line by connecting lines reached by the Clinchfield.

Nowhere in this condition is Paragraph 4 of Section 15 of the Act referred to. Nowhere are future routes referred to. The phrase "without discrimination as to routing," which was objected to because it might require short-hauling was eliminated. Certainly, if there had been an intention to require a waiver of Section 15 (4) this purpose should have been stated in clear language.

Condition 4, as Proposed.

This condition, *as proposed* by Chairman Hall, reads as follows:

> "(4). The applicants shall permit the line of the Clinchfield and its subsidiaries to be used as a link for through traffic, via existing gateways of interchange, or via such gateways as may here-

after be established under authority of the Commission by means of the connecting lines which the Louisville and Nashville Railroad Company proposes to build, equally available to such other carriers, now connecting, or which may hereafter connect, with the line of the Clinchfield and its subsidiaries, as may desire to participate in through routes and joint rates between points in territory north and west of the line of the Clinchfield and points at and beyond the Ohio River on the one hand and points in the southeastern territory on the other, *under divisions* to be agreed upon by the applicants, or either of them, and/or the Clinchfield organization, on the one hand, and by the other participating carrier or carriers on the other, *which shall not discriminate as to rates* against such participating carrier or carriers as compared with the applicants, or either of them; the intention of this provision being that the line of the Clinchfield and its subsidiaries shall be maintained as an open route equally available to all carriers connecting with the Clinchfield for traffic between the points designated." (Italics ours.)

Shorn of its qualifying phrases, Condition 4, as proposed by the Commission, in substance, requires:

"The applicants shall permit the line of the Clinchfield and its subsidiaries to be used as a link for through traffic . . . under *divisions* to be agreed upon . . . . *which shall not discriminate as to rates* against such participating carrier or carriers as compared with applicants, or either of them; the intention of this provision being that the line of the Clinchfield and its subsidiaries shall be maintained as an open route equally available to all carriers connecting with the Clinchfield for traffic between the points designated."

The requirement that the leased line shall be used as a link under *divisions which shall not discriminate* seemed to connote and by necessary implication require the establishment of through routes and joint rates over the leased line which would short-haul the lines of the applicants.

The applicants objected to Condition 4, as proposed, stating in their reply to Chairman Hall with reference to this condition and Condition 3 that:

> "Condition No. 3 and Condition No. 4, as suggested in the letter of Chairman Hall, would require that the Clinchfield and its subsidiaries be maintained as an open route, open to all carriers connecting with the Clinchfield, 'without discrimination as to routing or movement of traffic which is competitive with traffic of the applicants, or either of them' (Condition No. 3) and upon divisions 'which shall not discriminate as to rates against such participating carrier or carriers as compared with the applicants (Lessees), or either of them' (Condition No. 4).
>
> "The obvious effect of these two Conditions would be to require of these Lessees, in their control of the Clinchfield, the abandonment of the protection afforded them by the Congressional policy as declared in Section 15, Paragraph (4) of the Act to Regulate Commerce, providing that no carrier shall be required to use substantially less than its entire line in making through routes over its line for its competitors, and this burden would be applied as a limitation upon the title that the applicants would take under the proposed lease, and would be binding upon them and their successors in such title for the full period of the life of the lease.
>
> "This Commission has held in cases too numerous to be set out that in establishing a through

route it cannot compel a carrier to include substantially less than its entire line. (Citing cases.)

"If the Conditions were imposed, it would, as indicated above, amount to a requirement by the Commission, through indirection, of a condition that it could not impose directly." (R. 53-54.)

Condition 4, as Adopted.

Condition 4 was not adopted as proposed. The word "which," in the condition as proposed, connected the word "divisions" with the words "shall not discriminate as to rates." The condition was changed and re-written. The Commission eliminated the word "which" and substituted in place thereof the word "and," thus breaking the connection between the word "divisions" and the words "which shall not discriminate," so that the condition, as adopted, reads as follows:

"4. The applicants shall permit the line of the Clinchfield and its subsidiaries to be used as a link for through traffic, via existing gateways of interchange, or via such gateways as may hereafter be established under authority of the Commission by means of the connecting lines which the Louisville and Nashville Railroad Company proposes to build, equally available to such other carriers, now connecting, or which may hereafter connect, with the line of the Clinchfield and its subsidiaries, as may desire to participate in through routes and joint rates between points in territory north and west of the line of the Clinchfield and points at and beyond the Ohio River on the one hand and points in the Southeastern and Carolina territory on the other, under divisions to be agreed upon by the applicants, or either of them, and/or the Clinchfield organization, on the

one hand, and by the other participating carrier or carriers on the other, *and shall not discriminate as to rates, fares and charges* against such participating carrier or carriers as compared with the applicants, or either of them; the intention of this provision being that the line of the Clinchfield and its subsidiaries shall be maintained as an open route equally available to all carriers connecting with the Clinchfield for traffic between the points designated." (Italics ours.)

Shorn of its qualifying phrases and for the purpose of comparison, the condition, as adopted, requires:

"The applicants shall permit the line of the Clinchfield and its subsidiaries to be used as a link for through traffic . . . under divisions to be agreed upon . . . *and shall not discriminate as to rates, fares and charges*, against . . . participating carriers as compared with applicants, or either of them; the intention of this provision being that the line of the Clinchfield and its subsidiaries shall be maintained as an open route equally available to all carriers connecting with the Clinchfield for traffic between the points designated." (R. 91-92.)

This elimination of reference to "divisions . . . which shall not discriminate as to rates," met the principal objection of applicants to Condition 4, as proposed.

Appellants' Construction of Condition 4.

Having provided in Condition 3 against discrimination in service, the Commission in Condition 4 requires the line to be kept or maintained by the lessees as an open route equally available to all carriers connecting therewith.

Paragraph 4 of Section 5 of the Act deals with the consolidation of the railroads of the country into systems. It provides, in part, that:

> "In the division of such railways into such systems under such plan, competition shall be preserved as fully as possible and wherever practicable the existing routes and channels of trade and commerce shall be maintained."

Appellants construe Condition 4 as designed to carry into the lease the requirements of this paragraph of Section 5 of the Act.

The only statement in the lease case *in the nature of a finding* as to the necessity for any conditions *as to routes* follows immediately after the statement of the particulars in which the control authorized will promote the public interest, and reads:

> "Without some provision, however, for its use by other carriers as a link in through routes, control of the Clinchfield by the applicants would probably result in the abandonment of *existing routes*, especially the one via Elkhorn City and Chesapeake, and would doubtless result in placing the Seaboard and other carriers of the Southeast at a disadvantage . . . ; although as to other sections of the Southeast it might improve the competitive position of the Seaboard." (R. 89.) (Italics ours.)

It is apparent here that in considering the advisability of conditions, the Commission was thinking only of "existing routes" over lines then connecting with the Clinchfield, "especially the one via Elkhorn City."

The *existing routes*, via the Clinchfield, were known at the time of the lease and are referred to in the report as follows:

> "The Clinchfield has established in connection with the Chesapeake and other connecting lines, numerous through routes and joint rates between the Southeast and the Central West. . . . The Seaboard, the Coast Line, the Norfolk & Western and the Chesapeake prefer their central and eastern Virginia gateways for traffic," etc. (R. 84.)
>
> "The route via the Chesapeake from Cincinnati to Ashland, Ky., thence southward to Elkhorn City and over the Clinchfield into the Carolinas." (R. 85.)
>
> "The evidence is that some of the routes just described are competitive as to existing routes via the Clinchfield and the Chesapeake and the Norfolk & Western on the north, and other connections of the Clinchfield on the south, that the route via Elkhorn City is a feasible route;" etc. (R. 86.)
>
> "The proposed route via the Harlan County Branch would be competitive with the existing route via Elkhorn City," etc. (R. 86.)
>
> "Existing routes via Elkhorn City," etc. (R. 87.)
>
> "Control of the Clinchfield by the applicants would probably result in the abandonment of existing routes, especially the one via Elkhorn City and the Chesapeake." (R. 89.)

With this reference to "existing routes" throughout the report and with the "connecting lines" named in the report (R. 83-84), Condition 4 summarizes its requirements as follows:

> "The intention of this provision being that the line of the Clinchfield and its subsidiaries shall be *maintained as an open route* equally available

> *to all carriers connecting with* the Clinchfield for traffic between the points designated." (R. 92.) (Italics ours.)

Mr. Commissioner McManamy, in his dissenting opinion in the lease case, says:

> "The majority have endeavored to safeguard the *maintenance of existing through routes* by attaching certain conditions to the end that the Clinchfield will be *maintained as an open route, equally available to all connections.*" (R. 97.) (Italics ours.)

It will be noted that the language referred to by Mr. Commissioner McManamy is the language which appears in Condition 4 and that the Commissioner states that this language is designed to safeguard the maintenance of existing through routes.

In considering the probative effect of such a statement in a dissenting opinion as to the purpose of the majority of the Commission, the Court said, in *Southern Pacific vs. Interstate Commerce Commission*, 219 U. S., at Pages 449-450:

> "*Manifestly, this was deemed by the Commission to be the power which was being exerted,* since Mr. Commissioner Harlan, joined by the Chairman of the Commission, dissented on the ground that the order was an exertion of a power not possessed, to give effect to a supposed equitable estoppel, and no language was inserted in the opinion to indicate to the contrary." (Italics ours.)

The only words in Condition 4 which can be claimed to require the opening of the future routes here involved are those requiring that the line shall be used as a link

for through traffic available to "carriers now connecting or which may hereafter connect with the line of the Clinchfield." Under the facts in this case, these words have no reference to the line of the Georgia and Florida which is here involved. That line did not then and does not now connect with the line of the Clinchfield. In order to make the condition apply to the Georgia and Florida, it would have to read, "carriers now connecting with the line of the Clinchfield or which may hereafter connect with a line which connects with the Clinchfield." The condition does not so read. It was not intended that the condition should require the opening of the future routes here involved. This is made clear by the language of the report itself where the Commission, after finding that the control would promote the public interest, states that unless conditions are imposed the control might result "in the abandonment of existing routes" (R. 89). It is also made clear by the language of the condition itself where the Commission gives its own interpretation of the meaning of the condition and states that the "intention" of the condition is that "the line of the Clinchfield shall be maintained as an open route equally available to all carriers connecting with the Clinchfield."

If the words are construed to mean "carriers now connecting or which may hereafter be permitted to connect," they have a definite and lawful meaning. That this is the meaning which was intended is apparent when it is borne in mind that the Commission in the condition has just referred to such gateways as may hereafter be established under authority of the Commission, by means of connecting lines which the Louisville and Nashville Railroad Company pro-

poses to build. The making of a physical connection between railways is a matter within the exclusive jurisdiction of the Commission and cannot be required unless in the public interest (*Alabama & Vicksburg R. Co., vs. Jackson & Eastern R. Co.*, 271 U. S., 244). No line could connect with the Clinchfield in the future unless it first obtained authority from the Commission to construct and to connect. This authority to construct and to connect could be given only in accordance with the powers conferred on the Commission by Congress and only in compliance with the applicable standards of the Act. The through routes via such new line could be established only in the manner prescribed by Section 15 (3) of the Act and subject to the limitations contained in Section 15 (4).

It cannot be that the Commission by the use of the words "or which may hereafter connect" intended to give absolutely and without further consideration and to every railroad thereafter to be constructed the present right to connect with the line of the Clinchfield. Much less can it be contended that by the use of these quoted words the Commission intended to go further and provide that after such future construction the new railroad should have the right to through routes over the line of the Clinchfield, regardless of whether such through routes short-haul the lines of the lessees, and yet, when followed to its logical conclusion, this in effect is the holding of the District Court in this case.

It is familiar law that when the provisions of an instrument seem in conflict, every effort must be made to reconcile them, and this must be done if reasonably possible. It is equally familiar that in

reaching such reconciliation the declared general purpose of the instrument (in this case, the lease) will over-ride any apparently conflicting meaning of a particular clause, considered literally by itself separate from the rest of the instrument, and will limit the application of any such particular clause or condition to the declared general purpose of the instrument.

In *Barrett vs. Van Pelt*, 268 U. S., 85, the Court said:

> "Being satisfied of the legislative intention, the Court will not be prevented from giving that intention effect by a too rigid adherence to the very word and letter of the statute." (90.)

In *Darby-Lynde Co. vs. Collector of Internal Revenue*, 51 Federal (2nd) 56, Circuit Court of Appeals for the Tenth Circuit, said:

> "It frequently happens that the true intention of a legislative body is not expressed by the language employed in a statute, when literally construed. In such cases, the intent of such legislative body can only be effectuated by a departure from a literal interpretation of the language employed. Where such intention is plainly discernible from the provisions of the statute when considered as a whole, the real purpose and intent of the legislative body will prevail over the literal import of the words employed. (*Holy Trinity Church vs. United States*, 143 U. S., 457; *Hill vs. American Surety Co.*, 200 U. S., 197, 203; *Jones vs. Guaranty & I. Co.*, 101 U. S., 622, 626; *Barrett vs. Van Pelt*, 268 U. S., 85, 90; *Fleischmann Const. Co. vs. United States*, 270 U. S., 349, 360; *Baltzell vs. Mitchell*, 3 Fed. (2d), 428, 430; *London & L. I. Co. vs. Smoot*, 287 Fed, 952, 956.)"

Where there are two possible constructions of a written instrument, one of which raises grave doubt as to its validity, and the other does not, the construction which avoids the doubt is proper.

Harriman vs. Interstate Commerce Commission, 211 U. S., 407, 422.

United States vs. Delaware & Hudson, 213 U. S., 366, 408.

Federal Trade Commission vs. American Tobacco Co., 264 U. S., 298, 307.

Missouri Pacific R. Co. vs. Boone, 270 U. S., 466, 471-472.

The Words "Connecting Lines Reached by the Line of the Clinchfield Companies" in Condition 3, and the Words "Carriers Connecting With the Clinchfield" in the Commission's Statement of "the Intention" of Condition 4, Mean the Lines of Railroad Named in the Lease Report With Whom the Clinchfield Interchanged Traffic.

In its report in the instant case the Commission, referring to the conditions in the lease case, said:

> "There is no warrant for the limiting of the meaning of 'connecting lines' to the direct connections of the Clinchfield. The term is commonly used in referring to the lines in general making up a through route. There is in fact no other convenient term." (R. 29.)

This holding by the Commission, affirmed by the District Court, cannot be justified. The words "connecting lines" appear only in the phrase in Condition 3, reading: "connecting lines *reached by* the line of the Clinchfield companies." The words "reached by" have the same meaning in the condition that they have

in the lease report where the Commission states that the only ports between Norfolk and New Orleans not "reached by" the lines of the Coast Line-Louisville and Nashville system are Georgetown, South Carolina, and Fernandina, Florida (R. 89). The lines *reached by* the line of the Clinchfield are those with whom it interchanges business, and these are the Chesapeake & Ohio, Norfolk & Western, Southern, Seaboard, Charleston & Western Carolina, and Piedmont and Northern, named in the lease report (R. 83).

The word "connect" is defined in the *Century Dictionary* as "to bind or fasten together; join or unite; conjoin; combine." "Connecting lines," standing alone, might possibly be used to include lines reached by an intermediate carrier, but "connecting lines reached by the line of the Clinchfield" may not be so construed. In like manner, the language of Condition 4, to-wit: "all carriers connecting with the line of the Clinchfield," is perfectly definite. The words here mean the same thing as the words "reached by" in Condition 3. The line of the Clinchfield is a physical thing. It has definite position. It consists of a roadbed with rails thereon and a carrier which "connects with the line of the Clinchfield" is definitely and completely described. Such a carrier has physical contact through its line or track with the line or track of the Clinchfield.

It is respectfully submitted, therefore, that the Commission and the District Court were not justified in waving aside this major limitation of Conditions 3 and 4 by the simple assertion that "connecting lines" are "lines in general making up a through route."

The Northern Pacific is located in the Northwest. It is entirely possible by using a number of intermediate carriers to get a car from the line of the Northern Pacific on to the rails of the Clinchfield, and yet no stretch within the elastic limits of the English language would justify the statement that the Northern Pacific is a "connecting line reached by the line of the Clinchfield companies" (Condition 3), or that the Northern Pacific is a carrier "connecting with the line of the Clinchfield" (Condition 4). In like manner, it is entirely possible to get a car containing traffic from the track of the Clinchfield at Spartanburg to the track of the Georgia and Florida at Greenwood, and yet no one can truthfully say that the Georgia and Florida, which terminates at Greenwood, connects with the line of the Clinchfield, which begins at Spartanburg, or that the rails of the Georgia and Florida are "reached by the line of the Clinchfield Companies."

The Commission states that the words "connecting lines" are "commonly used in referring to lines in general making up a through route. There is in fact no other convenient term." We submit that this statement is inaccurate. In the first place, the language of the conditions is not "connecting lines," but "connecting lines reached by the lines of the Clinchfield," in Condition 3, and "all carriers connecting with the line of the Clinchfield," in the statement of the intention of Condition 4. The Commission, in its report in this case, has occasion several times to refer to and describe routes over several railroads and in no case does it use the terms "connecting lines" for this description. Thus (R. 14) the Commission refers to tariffs which contain "joint through rates applying over the Greenwood Exten-

sion of the Georgia and Florida *and its connections.*" Again (R. 18), in referring to the lines of the Louisville and Nashville, there appears the statement that "these lines *and their connections* serve a large area in Southern, Southwestern and Trunk Line Territories." Again (R. 20), the Commission refers to "existing joint rates between points on the Georgia and Florida and the Seaboard *and their connections.*" There are other similar instances. In no case does the Commission use the words "connecting lines" in describing the parties to a through route, but in each case uses the word "connections."

Appellants' Construction Accords With the Law.

The construction of the conditions contended for by the appellants is in accord with the applicable standards of the Act as construed by this Court. In *United States vs. Missouri Pacific R. Co.*, 278 U. S., 269, the Court in construing Section 15 (4) said:

> "The Act does not give the Commission authority to establish all the through routes it may deem necessary or desirable in the public interest. The general language of Paragraph 3 is limited by Paragraph 4. The latter lays down the rule that, subject to specified exceptions, a carrier may not be compelled to participate in a through route which does not include substantially its entire line lying between the termini of the route. The purpose is to protect the long-haul routes of carriers." (Pages 276-277.)

By this decision of this Court the law is settled that the short-hauling inhibitions of Paragraph (4) cannot be read out of the statute by interpretation; that the plain and unambiguous language of this para-

graph "leaves no room for construction"; and that the specified exceptions to the short-hauling provisions of Paragraph (4) do not include any public interest in the rehabilitation of a financially weak railroad. Such interest as the public may have in that matter is provided for in other portions of the Interstate Commerce Act, as amended by the Transportation Act, 1920 (*Dayton-Goose Creek R. Co. vs. United States*, 263 U. S., 456; *A. C. & Y. R. Co. vs. United States* [*New England Divisions case*], 261 U. S., 184; *United States vs. Abilene & Southern R. Co.*, 265 U. S., 274).

In the case of *United States vs. Chicago, Milwaukee, St. Paul and Pacific R. Co.*, 282 U. S., 311, where there were involved conditions imposed by the Commission in granting authority under Section 20a of the Act, this Court said:

> "The power to impose such conditions, however, is not unlimited and may not be exercised arbitrarily or (since Congress can not delegate any part of its legislative power except under the limitation of a prescribed standard—*Union Bridge Co. vs. United States*, 204 U. S., 364, 384, 385), unless there be found substantial warrant for the conditions in the applicable standards established by the provisions of the Act relating to such securities."

Paragraph 2 of Section 5 of the Act, under which the application in the lease case was made, provides that:

> "The Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall

be found by the Commission to be just and reasonable in the premises."

The similar provision in Section 20a reads as follows:

> "The Commission shall have power by its order to grant or deny the application as made, or to grant it in part and deny it in part, or to grant it with such modifications and upon such terms and conditions as the Commission may deem necessary or appropriate in the premises. . . ."

The Commission is no less bound by the applicable standards of the Act in a proceeding under Paragraph 2 of Section 5 than it is in a proceeding under Paragraph 20a. Paragraph 4 of Section 15 is one of the standards. Paragraph 3 of Section 3 is another of the standards. Paragraph 4 of Section 5 is another. All of these sections stand together and are limitations on the power of the Commission.

These provisions are the standards to which lawful conditions must conform. Compare these with the so-called "test" prescribed by the Commission and by the Court below. The Commission states that "the test to be applied is that of the proper relationship between the Clinchfield as an *independent line* and its connections to and from Southeastern Territory" (R. 21). The District Court says that in cases such as this, roads handling through traffic passing over the Clinchfield are to be treated "*just as though the lease were not in existence* and the Carolina, Clinchfield & Ohio were *an entirely independent road independently operated*" (R. 141).

Who is to determine what these proper relationships are if Section 15 (4) is to be disregarded? How

are we to determine, six years after the control has been authorized and the lease executed, what the Clinchfield would do if the lease were not in existence and the Clinchfield were independent? What is the rule to be applied in any particular case in the establishment of routes over the Clinchfield? If the order of the Commission and decision of the District Court are right, then Section 15(4) of the Act is eliminated, and there is nothing left except the "test" of what the Commission, in each particular case, thinks is in the public interest, regardless of whether or not it will short-haul the Coast Line. The Commission is here seeking to make a special rule governing the Clinchfield lease, and to exercise a power which is essentially legislative. In *Prentis vs. Atlantic Coast Line*, 211 U. S., 210, the Court said:

> "Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power." (226.)

This Court, in *Harriman vs. Interstate Commerce Commission*, 211 U. S., 407, said:

> "Whether Congress itself has the unlimited power claimed by the Commission, we also leave on one side. . . . It is enough for us to say that we find no attempt to make such a delegation anywhere in the Act." (418.)

II.

As Construed by the Commission, and the District Court, Conditions 3 and 4 are in Conflict with the Findings in the Lease Case and with the Standards of the Act and are Beyond the Power of the Commission to Impose.

(a) Conflict With the Findings in the Lease Case.

(1) It was argued by the defendants in the lower Court that Condition 3 requires the maintenance of existing routes and Condition 4 requires the opening of future through routes such as are here involved, regardless of whether or not such routes short-haul the Coast Line system lines. Neither the Commission in its report in this case, nor the District Court in its opinion, construe Conditions 3 and 4 separately. The Commission holds that the purpose of the conditions was to preserve the relationships "usually and normally existing between independent railroads and those whom it serves" (R. 28-29).

The District Court quotes and adopts the reasoning of the Commission (R. 142-144), and holds that the conditions were designed to require that "in a case such as this, roads handling through traffic passing over it were to be treated just as though the lease were not in existence and the C. C. & O. were an *entirely independent road, independently operated*" (R. 141). (Italics ours). It also holds that by accepting the conditions, applicants gave their consent to the short-hauling here involved (R. 146).

This construction of the conditions entirely disregards the finding by the Commission that the public interest required "*control* of the Clinchfield by the

applicants," and that this control was authorized *because of the fact* that "the Clinchfield is not rendering the service for which it was designed and of which it is capable," and "so long as it continues as an independent line its usefulness to the public will be circumscribed" (R. 89). The construction entirely negatives control so far as concerns the use of the Clinchfield as a system line in future through routes. It requires, as a condition to the acceptance of the control found to be in the public interest, the surrender of the rights guaranteed to all carriers by railroad by Section 15 (4) of the Act.

(2) The Commission in its report in the instant case quotes from the conditions and discusses their meaning (R. 89), and the District Court adopts this construction (R. 142). In this discussion the Commission overlooks the qualifying phrases in Condition 3, which it has just quoted, and proceeds to discuss the meaning of "present neutrality" and "connecting lines," as if that were the language used, whereas the language in the condition is "present neutrality of handling traffic" and "connecting lines reached by the lines of the Clinchfield." The qualifying words in these two phrases certainly have some meaning as used in the condition. "Present neutrality of handling traffic" is not the same as "present neutrality," meaning the absence of all control. We have heretofore shown that the "connecting lines" which are "reached by the lines of the Clinchfield" are the lines named in the lease report with whom, at the time of the lease, the Clinchfield interchanged traffic (R. 83-84).

(b) Conflict With the Standards of the Act and Beyond the Power of the Commission.

The construction placed on the conditions by the District Court brings them into conflict with the Act. The conditions, as so construed, are beyond the power of the Commission to impose.

In *United States vs. Chicago, Milwaukee, St. P. & P. R. R. Co.*, 282 U. S., 311, this Court held:

> "The power to impose such conditions, however, is not unlimited and may not be exercised arbitrarily or (since Congress cannot delegate any part of its legislative power except under the limitation of a prescribed standard—*Union Bridge Co. vs. United States*, 204 U. S., 364, 384, 385, 51 L. Ed. 523, 532, 533, 27 S. Ct. 367), unless there be found substantial warrant for the conditions in the applicable standards established by the provisions of the Act relating to such securities."
>
> . . . . . .
>
> "The decisions rest upon a principle which is 'broader than the application thus far made of it.'"
>
> . . . . . .
>
> "The order in itself, being complete and self-sustaining and resting upon grounds found to be sufficient to support it, *cannot be made to depend upon submission to a collateral condition which, as we have shown, is beyond the statutory and constitutional power of the Commission to impose.* Whatever may be the general rule, we have no difficulty in concluding that, under the circumstances above recited, the principle in respect of the separability of unconstitutional conditions imposed upon a privilege granted by a State is applicable to the present order of the Commis-

sion—and for a stronger reason, since that body, unlike a State in the class of cases referred to does not possess the power arbitrarily to deny the authority here sought by the carrier." (Italics ours.)

In *Frost vs. Railroad Commission of California*, 271 U. S., 583, cited in the *Milwaukee case*, this Court held:

"There is involved in the inquiry not a single power, but two distinct powers. One of these—the power to prohibit the use of the public highways in proper cases—the State possesses; and the other—the power to compel a private carrier to assume against his will the duties and burdens of a common carrier—the State does not possess. It is clear that any attempt to exert the latter, separately and substantively, must fall before the paramount authority of the Constitution. May it stand in the conditional form in which it is here made? If so, constitutional guarantees so carefully safeguarded against direct assault, are open to destruction by the *indirect but no less effective process of requiring a surrender, which though in form voluntary, in fact lacks none of the elements of compulsion.* Having regard to form alone, the Act here is an offer to the private carrier of a privilege, which the State may grant or deny, upon a condition which the carrier is free to accept or reject. In reality, the carrier is given *no choice, except a choice between the rock and the whirlpool*—an option to forego a privilege which may be vital to his livelihood, or to submit to a requirement which may constitute an intolerable burden.

"It would be a palpable incongruity to strike down an Act of State legislation, which by words of express divestment, seeks to strip the citizen

of rights guaranteed by the Federal Constitution, but to uphold an Act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the State threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the State, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the State in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the State may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties imbedded in the Constitution of the United States may thus be manipulated out of existence." (Pages 593-594.) (Italics ours.)

The application in the lease case was made under Paragraph 2 of Section 5 of the Act, which provides that, whenever the Commission is of opinion, after hearing that the acquisition by a carrier of control of another carrier under a lease or by the purchase of stock, or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission may approve and authorize such acquisition "under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises." The words "just and reasonable" in this section are not a grant of power, nor are they the only limitation on the power of the Commission to impose conditions. The

conditions must not only be just and reasonable, but they must be based on the applicable standards established by the Act. The grant of power to attach any conditions which the Commission deems just and reasonable in a particular case would be the grant of legislative power, which cannot be delegated.

Paragraph 3 of Section 3 deals with discrimination. Condition 3 provides that there shall be no discrimination in service by the lessees after the lease against competitive traffic moving over routes existing at the time of the lease, and so construed is within powers conferred by the Act. Paragraph 4 of Section 5 of the Act deals with the consolidation of railroads into systems and provides that in the division of railroads into such systems "competition shall be preserved as fully as possible and wherever practicable the *existing routes* and channels of trade and commerce shall be maintained." Condition 4 deals with this subject and summarizes its requirements as follows:

> " . . . the intention of this provision being that the line of the Clinchfield and its subsidiaries shall be maintained as an open route equally available to all carriers connecting with the Clinchfield for traffic between the points designated."

Future routes are provided for in Paragraph 3 of Section 15, which requires a hearing and a finding of public interest before such a route can be established. This is the only section of the Act which confers on the Commission power to establish routes. This Court has held that Paragraph 4 of this Section 15 is a definite limitation on this power of the Commission and that the purpose of Section 15 (4) is "to

protect the long-haul routes of the carriers" (*United States vs. Missouri Pacific*, 278 U. S., 269). Nowhere in the Act is the Commission given power to require as a condition to a lease found to be in the public interest the waiver of the provisions of Section 15 (4). Nowhere in the Act is the Commission given power to require the opening of future routes without compliance with the provisions of Section 15 (3). Applicants construe the conditions as intended to be within these limitations on the power of the Commission.

The District Court holds that unless precluded by the conditions of the lease the complainants would have the right to their long-hauls here involved (R. 138); that the conditions preclude this right; that this case is to be decided "just as though the lease were not in existence and the Carolina, Clinchfield & Ohio an entirely independent road, independently operated" (R. 141), and that the answer to the argument of the appellants as to the short-hauling of their lines is "that these carriers gave their consent to this when they accepted the Carolina, Clinchfield & Ohio lease" (R. 146).

The construction of Conditions 3 and 4 by the District Court is bottomed on the assumption that Paragraph 2 of Section 5 of the Act grants to the Commission unlimited power to impose in a lease case any conditions which the Commission deems just and reasonable and that the Commission is by this section empowered to require by conditions the opening of through routes without a hearing or a finding of public interest as required by Section 15 (3), not only over existing lines but over lines not then in existence, and as to such routes so opened require that

the lessee shall waive the protection afforded to all carriers by Section 15 (4) of the Act. We confidently assert that there is no such grant of power to the Commission in the Act.

The Commission is a creature of the statute. Its powers and duties are prescribed and fixed by the Act of Congress, and necessarily so, since Congress cannot delegate to the Commission legislative power except under the limitation of a prescribed standard.

In its opinion the District Court said that if the conditions were beyond the power of the Commission, "it results not that they are void and the lease unconditional, but that the lease itself is unauthorized" (R. 145). This indicates a misconception of the position of the applicants. Appellants have never contended that the conditions are void. They contend that the conditions properly construed are within the standards of the Act and impose definite obligations on the lessees. These obligations have been accepted and carefully observed from that time down to the present. Appellants contend that the conditions should not be so construed as to place them beyond the power of the Commission to impose.

III.

The Failure of Atlantic Coast Line Railroad Company to Intervene, in 1926, in the Georgia and Florida Construction Case, then Pending Before the Commission, Should Not be Considered in Determining the Meaning of the Clinchfield Conditions Imposed in 1924.

In 1926 an application was filed with the Commission in the matter of the Reorganization and Extension of Georgia and Florida Railway. The application involved the financial reorganization of the Georgia and Florida Railway, and the construction by the reorganized company of an extension of its railway from Augusta, Georgia, to Greenwood, South Carolina. A copy of the application was sent to the Atlantic Coast Line Railroad Company. The Coast Line made no reply and did not intervene in the extension case (R. 23). It was claimed by defendants before the lower Court in the argument in this case, that the failure of the Coast Line, in 1926, to appear in the extension case, and there take the same position which it has taken in this case with reference to the meaning of the conditions in the Clinchfield lease case, estops the Atlantic Coast Line from now setting up its contention. The District Court held that while the failure of the Coast Line so to appear did not operate as estoppel, nevertheless, the fact that it did not appear "*is a pertinent matter for consideration in determining the meaning of the conditions under which the Carolina, Clinchfield & Ohio lease was approved*" (R. 141). (Italics ours.)

Appellants respectfully submit that the failure of the Atlantic Coast Line Railroad Company, to appear in 1926 in the construction case has no pos-

sible bearing on the meaning of conditions imposed in 1924 in the lease case. The construction case did not involve routes, and any intervention by the Coast Line in that case for the purpose of discussing routes would have been out of place. The question there involved was whether public convenience and necessity required the construction of the extension of the Georgia and Florida. The Commission states in the instant case that in the construction case, "We did not then consider what specific through routes and joint rates thereover should be applicable" (R. 22).

Consideration of that question had no proper place in the Georgia and Florida Construction Case and could not have been considered in that case by the Commission. Had the Atlantic Coast Line appeared in the Construction Case it would not have been permitted to discuss the question of through routes, but if so it could not have made its position any plainer than it did in the reply to Chairman Hall in the lease case, filed as Exhibit 3 in this case. Certainly there was no duty on the Atlantic Coast Line to intervene in a case in order to raise a question that could not be there considered or decided, and it should not be criticised for failing to do an unnecessary and useless thing, nor can its failure to appear and protest against the granting of the certificate be considered as evidence that it had changed its position so clearly set out in the reply to Chairman Hall. It is not apparent how its failure to appear and protest the granting of the certificate in the Georgia and Florida Construction Case can be pertinent in determining the meaning of the conditions in the Clinchfield lease case.

IV.

The Order of the Commission, in this Case, Requiring the Cancellation of the Restrictive Routing Notes, was, in Effect, an Order Requiring the Opening of New Through Routes Without the Finding of Public Interest Required by Paragraph 3 of Section 15 of the Act.

The plain language of Paragraph 3 of Section 15 of the Act, provides that the Commission cannot establish a through route except after a full hearing and a finding as to public interest. Paragraph 4 of the same section provides against short-hauling without the consent of the road short-hauled. Consent by a railroad, under Paragraph 4, cannot confer on the Commission jurisdiction to establish a through route without making the finding required by Paragraph 3. *Admittedly, the Commission has not made such a finding.* Its reason for not doing so is stated in its report in this case, Exhibit 1, in the following language:

> "We are not called upon in this proceeding to require the establishment of through routes, joint rates, and divisions, as might have been required if through routes and joint rates had not been *contemporaneously established* with the opening of the Greenwood Extension. Our powers are limited by Section 15 (4) in a case where carriers seek to close existing through routes and make joint rates thereover in-applicable to the same extent as in a case where we are authorized initially to establish through routes and joint rates. This proceeding is brought under Section 15 (7), under which we must determine whether the proposed restrictions, having for their purpose *the closing of existing routes*, and of making joint rates in-applicable thereover, are justified." (R. 22.) (Italics ours.)

The facts of this case are that the opening of the Georgia and Florida extension between Augusta and Greenwood was, in schedules already applicable via appellants' lines, announced to take effect June 1, 1929 (R. 14). In the same schedules appellants published to become effective May 20, 1929, and later dates, the following restrictive routing note (R. 16):

> "The rates to, from, or via the line of the Georgia and Florida Railroad between Augusta, Ga., and Greenwood, S. C., apply in connection with Atlantic Coast Line Railroad, Charleston & Western Carolina Railway, and/or Columbia, Newberry and Laurens Railroad, only on traffic interchanged between Atlantic Coast Line Railroad or Charleston & Western Carolina Railway and Georgia and Florida Railroad at Augusta, Ga., or between Charleston & Western Carolina Railway and Georgia and Florida Railroad at Greenwood, S. C., to or from points on Georgia and Florida Railroad between Augusta, Ga., and Greenwood, S. C., not including Augusta, Ga., or Greenwood, S. C."

Restrictive notes in similar form as set out above were published in the same schedules to become effective May 20, 1929, and later dates, for account of the Georgia Railroad, Atlanta & West Point Railroad, Western Railway of Alabama, Carolina, Clinchfield & Ohio Railroad, Carolina, Clinchfield & Ohio Railroad of South Carolina, and Clinchfield Northern Railway of Kentucky (R. 16). The effect of these routing notes filed to become effective on or before June 1, 1929, was to prevent the application of the rates in said schedules to new routes that would otherwise have been automatically established upon the opening for traffic of the Georgia and Florida ex-

tension on June 1, 1929. These routing notes having been filed to become effective on or before June 1, 1929, the only way said new routes could be opened was by the cancellation of the routing notes. The order of the Commission cancelling such routing notes necessarily resulted in the opening of routes via the Georgia and Florida extension in connection with appellants' system lines. As to the restrictive routing notes filed to become effective on or before June 1, 1929, the Commission is clearly in error in stating, as per quotation above, that these through routes and joint rates had been contemporaneously established by the opening of the Georgia and Florida extension. The purpose and effect of the restrictive routing notes published before the extension was open for traffic was to prevent this result. The Commission seeks to sustain its order on the theory that the restrictive notes *closed existing routes.* The restrictive notes *prevented* the opening of future routes.

The Commission concedes that if the order opened new routes it was under statutory duty to make a finding of fact as to public interest after a full hearing under the requirements of Paragraph 3 of Section 15 of the Act. This was not done. There was no attempt to comply with the requirements of this section. It is not possible to have an existing route over a line of railroad not then open for traffic. It is not possible to close a route that never existed.

CONCLUSION.

In our argument we have given our construction of Conditions 3 and 4 as covering possible conditions that might arise, but this broad consideration is not necessary in order to decide the issues presented by this appeal. For that reason we have also given our construction of these conditions as they apply to the specific issues here raised. We respectfully submit that the meaning of Condition 3 and Condition 4 considered with reference to the specific issues raised in this case, require a reversal of the opinion of the District Court.

Condition 3.

The Greenwood extension of the Georgia and Florida was not in existence at the time these conditions were imposed by the Commission in the Clinchfield lease case. The construction of the Georgia and Florida extension was not begun until two years after the lease case was decided. Therefore the phrase "existing routes and channels of trade and commerce heretofore established by other carriers in connection with the Clinchfield," as used in Condition 3, has no possible application to a line of railroad which was not then in existence. In like manner, so far as concerns the Georgia and Florida, there were no "existing gateways for the interchange of traffic with such other carriers," as referred to in Condition 3, since this particular carrier had no line of road from Augusta, Georgia, to Greenwood, South Carolina, that might then have been used as a part of a through route reached by an existing gateway. There were no "existing routes and channels of trade and commerce" established over such line either then or there-

tofore as referred to in Condition 3. The phrase " * * * to and from all connecting lines reached by the line of the Clinchfield Companies" in Condition 3 can have no possible application whatever to the Georgia and Florida extension. Condition 3 does not fit the facts of this case.

Condition 4.

This brings us to a consideration of Condition 4 as applied to the facts and issues of this case. The Georgia and Florida extension not then being in existence, cannot be covered by the language of Condition 4 which limits the condition to "such other carriers, now connecting, or which may hereafter connect with the line of the Clinchfield and its subsidiaries." A line not then in existence could not then connect with the Clinchfield. Since the line when constructed ended at a point eighty-nine miles from the line of the Clinchfield, it is equally obvious that the words "or which may hereafter connect with the line of the Clinchfield and its subsidiaries," as used in this condition, can have no application to the Greenwood extension of the Georgia and Florida even when completed. This line does not come within the purview of the phrase "now connecting" nor within the phrase "which may hereafter connect." Whatever may be the meaning of Condition 4 as to a line "which may hereafter connect," it is too plain to admit of argument that it has no application whatever to the Georgia and Florida extension which did not then connect and does not now connect with the line of the Clinchfield and its subsidiaries.

The District Court construes these words as meaning now connecting or which may hereafter connect

via an intermediate line of railroad that does in fact connect with the Clinchfield. This construction cannot be sustained under either the spirit or the letter of the condition. It requires the writing into the condition of words that were not used and creates obligation far beyond the meaning of the words that actually were used. In fact, such a construction would throw the Clinchfield open to every line of railroad in the continental United States, because if these words mean lines connecting through another line or lines that ultimately may connect with the Clinchfield, there is no limitation that could be imposed on the comprehensive scope of the condition thus construed. Obviously, the Commission could not have intended that such a meaning should be attached to these conditions.

Respectfully submitted,

F. B. GRIER,
M. G. MCDONALD,
CARL H. DAVIS,
Solicitors for Appellants.

Wilmington, N. C.,
October 26, 1931.

APPENDIX.

Section 3 (3):

"All carriers, engaged in the transportation of passengers or property, subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper."

Section 5 (2):

"Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers, either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises."

Section 5 (3):

"The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1) or (2), as it may deem necessary or appropriate."

Section 5 (4):

"The Commission shall as soon as practicable prepare and adopt a plan for the consolidation of the railway properties of the continental United States into a limited number of systems. In the division of such railways into such systems under such plan, competition shall be preserved as fully as possible and wherever practicable the existing routes and channels of trade and commerce shall be maintained. Subject to the foregoing requirements, the several systems shall be so arranged that the cost of transportation as between competitive systems and as related to the values of the properties through which the service is rendered shall be the same, so far as practicable, so that these systems can employ uniform rates in the movement of competitive traffic and under efficient management earn substantially the same rate of return upon the value of their respective railway properties."

Section 15 (3):

"The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property, or the maxima or minima, or maxima and minima, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares and charges applicable thereto), and the division of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated; and this provision, except as herein otherwise provided, shall apply when one of the carriers is a water line. The Commission shall not, however, establish any through route, classification, or

practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character; nor shall the Commission have the right to establish any route, classification, or practice, or any rate, fare, or charge, when the transportation is wholly by water, and any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water."

Section 15 (4):

"In establishing any such through route the Commission shall not (except as provided in Section 3, and except where one of the carriers is a water line), require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established: *Provided*, That in time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest."

Section 15 (7):

"Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision

may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate, fare, or charge increased after January 1, 1910, or of a rate, fare, or charge sought to be increased after the passage of this Act, the burden of proof to show that the increased rate, fare, or charge, or proposed increased rate, fare, or charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

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No. 88

In the Supreme Court of the United States

OCTOBER TERM, 1931

ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, AND CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY, APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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v.

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OPINIONS BELOW

The opinion of the specially constituted District Court (R. 135) is reported in 48 F. (2d) 239. The report of the Interstate Commerce Commission (R. 13) is reported in 165 I. C. C. 3.

JURISDICTION

The decree of the District Court was entered March 9, 1931. (R. 147.) Petition for appeal was filed April 23, 1931, and was allowed the same day. (R. 155, 156.)

The jurisdiction of this Court rests on the Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (U. S. C., Title 28, Sec. 47), as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S. C., Title 28, Sec. 345).

QUESTIONS PRESENTED

(1) Whether the Greenwood extension of the Georgia & Florida is within the protection of the conditions which the Commission attached to its approval of the Clinchfield lease.

(2) Whether the conditions upon which the Commission approved a lease of the Clinchfield were authorized by Section 5 (2) of the Interstate Commerce Act.

(3) Whether the Commission's order in this case had the effect of requiring the establishment of new through routes within the meaning of Section 15 (3) of the Interstate Commerce Act.

(4) Whether appellants, after they had remained silent during proceedings in which the Commission approved the construction of the Greenwood extension upon the assumption that it was protected by the conditions of the Clinchfield lease, could, after the extension had been constructed, invoke the aid of a court of equity to deny such protection.

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix, *infra,* pp. 34–37.

STATEMENT

This is a suit in equity under the Act of October 22, 1913, to set aside an order of the Interstate Commerce Commission requiring the cancellation of certain restrictive routing schedules filed by the Atlantic Coast Line and various railroads controlled by it. (R. 1–3, 6, 8, 10.) The order was entered in a proceeding under Section 15 (7) of the Interstate Commerce Act (*infra,* p. 36) initiated by protests filed with the Commission by the Piedmont and Northern Railway Company (hereinafter referred to as the Piedmont) and by the Georgia & Florida Railroad (referred to herein as the Georgia & Florida). (R. 8–9.) The Commission, the Piedmont, and the Georgia & Florida have intervened in defense of the order. (R. 106–107, 111, 121–122.)

The restrictive schedules which the Commission ordered cancelled were filed as supplements to tariffs which contained joint through rates applicable over the line of the Piedmont between Spartanburg, S. C., and Greenwood, S. C., and over the line of the Georgia & Florida between Greenwood and Augusta, Ga. (R. 14.) At Spartanburg the Piedmont connects with the Carolina, Clinchfield & Ohio Railway. (R. 17.) The main line of that railroad and its subsidiaries (referred to herein as the

Clinchfield) runs approximately north and south between Spartanburg and Elkhorn City, Ky. (R. 17.) By reason of a connection between the Clinchfield and the Chesapeake & Ohio Railway Company at Elkhorn City the Clinchfield, Piedmont, and Georgia & Florida are links in a through route between points at and beyond the Ohio River, on the one hand, and points in southeastern and Carolina territory, on the other. (R. 20, 85–87.) The purpose of the restrictive schedules was to close the combined line of the Piedmont and Georgia & Florida between Spartanburg and Augusta as a link in this through route and thereby make applicable a combination of higher local rates. (R. 14.)

The Clinchfield is leased to the Atlantic Coast Line and Louisville and Nashville Railroad Company. (R. 18, 23.) The Charleston & Western Carolina Railway Company (hereinafter referred to as the Charleston) has a line running south from Spartanburg, through Greenwood, to Augusta. (R. 17.) The combined line of the Piedmont and the Georgia & Florida between Augusta and Spartanburg is 15 miles longer than the line of the Charleston between these points, but this presents no question of undue circuity. (R. 17.) The lines of the Clinchfield, Piedmont, Georgia & Florida, Charleston, and the lines of the Atlantic Coast Line system are shown in a map attached as an exhibit to appellants' bill. (R. 34.)

Appellants urged in justification of the restrictive schedules that the Atlantic Coast Line, the

Clinchfield, and the Charleston are operated under a common management or control; that the conditions attached to the Commission's order approving the Clinchfield lease do not cover the through rates over the Greenwood extension of the Georgia & Florida; and that to compel maintenance of through rates on traffic carried over the Clinchfield and then over the Piedmont and Georgia & Florida to Augusta, and vice versa, is to require them, without their consent, to join in through routes which do not embrace the entire length of their railroad, in violation of Section 15 (4) of the Interstate Commerce Act (*infra*, p. 35). (R. 136.) Both the Commission and the District Court found that the conditions attached to the Commission's approval of the Clinchfield lease require the maintenance of the Clinchfield as an open route, equally available to all connecting carriers, for the movement of traffic between points at and north of the Ohio River and points in the Southeast and that these conditions apply to through traffic over the Greenwood extension of the Georgia & Florida. (R. 28–30, 141–144.) Since appellants, by accepting the lease, had consented to the through routing, the limitations imposed by Section 15 (4) upon the power of the Commission to establish through routes do not apply. (R. 146.)

The circumstances under which the Commission approved the Clinchfield lease are fully set forth in its report[1] and order in that proceeding, which are

[1] Reported in *Clinchfield Railway Lease*, 90 I. C. C. 113.

part of the record in this case. (R. 67–100.) From the report of the Commission it appears that the Atlantic Coast Line and the Louisville & Nashville in July, 1923, filed a joint application with the Commission under Section 5 (2) of the Interstate Commerce Act (*infra*, p. 34) for authority to lease for 999 years all the property of the Clinchfield. (R. 69, 72.) The Louisville & Nashville proposed, if the lease should be approved, to extend one of its branch lines serving the Hazard coal fields to connect with the Clinchfield at Elkhorn City and to connect another branch line serving other Kentucky coal fields with the Clinchfield south of Elkhorn City. (R. 73–76.) The links with the Clinchfield were expected to open the Southeast as a market for coal mined on these branch lines and to relieve an intolerable car-supply condition on these lines. (R. 73–75.) The Louisville & Nashville nevertheless did not consider it advantageous to build the connections with the Clinchfield unless it had an interest in the haul over that road. (R. 82.) On the part of the Atlantic Coast Line it was urged that the lease would give it and the industries in the territory reached by it access over one system to the coal mines on the Clinchfield. (R. 78, 88.)

The Piedmont, Georgia & Florida and Seaboard Air Line Railway Company, and representatives of certain public and commercial bodies in the Southeast, opposed the granting of an unconditional lease. (R. 69, 90.) The three intervening

carriers represented that if joint rates on traffic moving over the Clinchfield should be closed to them they would be deprived of traffic which might otherwise move over their lines or future extensions thereof, and that existing and potential competitive routes would thereby be destroyed. (R. 19–20.) The Georgia & Florida also opposed the unconditional leasing of the Clinchfield because of its then announced intention of seeking authorization to extend its line to Greenwood so as to obtain, through the medium of the Piedmont & Northern, a connection with the Clinchfield at Spartanburg. (R. 20.) It feared that unconditional approval of the lease would result in restrictions of joint rates which would discriminate against the Greenwood extension in favor of the Charleston. (R. 20.)

Before arriving at any conclusion in the lease proceedings the Commission addressed a memorandum to all the parties requesting consideration of the effect of an order of approval made subject to certain conditions set forth therein. (R. 90.) The Atlantic Coast Line and the Louisville & Nashville filed a written reply in which they objected to conditions 3 and 4 on the ground, *inter alia,* that their effect would be to require them, in operating the Clinchfield, to consent to through routing of competitive traffic and thus to waive the protection which would otherwise be given them by the long-haul provision of Section 15 (4). (R. 35, 46–47, 54.) Notwithstanding this protest, the Commission

found that the lease would be in the public interest only if made subject to these conditions. (R. 91.)

The order approving the lease contains the following proviso (R. 99):

> That the making of said lease and exercise of any of the rights conferred by this order shall in all future proceedings, judicial as well as administrative, to which the carriers above named, or any of them, may be parties, be deemed and taken as conclusive evidence of their acceptance of, and agreement to abide by, the conditions enumerated in said report, and numbered from 1 to 5, inclusive.

Two years after this approval of the Clinchfield lease an application by the Georgia & Florida to extend its line from Augusta to Greenwood was submitted to the Commission for decision. The Atlantic Coast Line did not respond to the notice given it, and neither it nor any of its subsidiaries or controlled lines appeared at the hearing. (R. 23.) The Commission in passing upon the application did not consider what specific through routes and joint rates would be applicable over the extension, but it took judicial notice of its findings in the Clinchfield Lease case and it based its approval of the construction primarily on the Georgia & Florida's expected participation in traffic between points north of the Ohio River and points in the Southeast. (R. 23.) It said in its report[2] (R. 22–23):

[2] Reported in *Reorganization and Extension of Georgia & Florida Ry.*, 117 I. C. C. 473.

> Through the medium of the Piedmont & Northern it [Georgia & Florida] will also have an advantageous connection with the Clinchfield Railroad at Spartanburg, S. C., and through this connection it expects to realize a substantial participation in the tonnage of coal and other commodities moving southbound over the Clinchfield destined to southern Georgia and Florida, and in the northbound movement of freight, principally citrus fruits and vegetables, from southern territory. The lines of the Southern Railway and the Charleston & Western Carolina, the latter a part of the Atlantic Coast Line system, also extend between Greenwood and Spartanburg, connecting with the Clinchfield, but as both of these lines have their own connections to the south the Georgia & Florida must look principally to the Piedmont & Northern for its interchange with the Clinchfield.

The Greenwood extension was subsequently built at a cost of about $3,300,000. (R. 128, 141.) The Atlantic Coast Line was thus charged with knowledge that the Commission had approved construction of this extension upon the premise that the extension would have the benefit of joint through rates, equal to those applying on transportation over the Atlantic Coast Line system, on traffic moving over the Clinchfield between points north of the Ohio River and points in the Southeast. The Atlantic Coast Line did not question this right, so far as the record shows, until the extension had

been practically completed, when the restrictive schedules here involved were filed.[3]

SUMMARY OF ARGUMENT

I. When the Atlantic Coast Line and the Louisville & Nashville applied to the Commission for approval of acquisition of control of the Clinchfield by a joint lease of its properties, the Commission found that the lease would be in the public interest only upon certain conditions. Conditions 3 and 4 were imposed to meet the objection made by intervening carriers that an unconditional lease would destroy existing and potential through routes via the Clinchfield. The Georgia & Florida, one of the interveners, announced that it planned to extend its line to Greenwood and expressed apprehension that an unconditional lease would result in discrimination against this extension, when constructed, in the matter of joint rates on through traffic passing over the Clinchfield and the intermediate line of the Piedmont. The broad language of the conditions and the facts before the Commission when they were imposed negative an intention to limit their application to lines physically connecting with the Clinchfield. But even if the protection which they give is so limited, the restrictive routing schedules which the Commission in this case

[3] The Georgia & Florida alleges that appellants, prior to the filing of the restrictive schedules, made no objection at any time to the authorization or construction of the extension. (R. 128.)

ordered cancelled are a violation of the conditions of the Clinchfield lease because the schedules discriminate against the Piedmont in the matter of joint through rates and the Piedmont directly connects with the Clinchfield.

So far as the present controversy is concerned, there is no substantial difference between the meaning of conditions 3 and 4 as worded in the Commission's report and their meaning as worded in the Commission's preliminary proposal while the lease was under consideration. The conditions are also not inconsistent with the Commission's findings in its report on the Clinchfield lease.

II. Section 5 (2) of the Interstate Commerce Act authorizes the Commission to approve the acquisition of control of another carrier by lease "on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises." Conditions 3 and 4 of the Clinchfield lease are within the statutory authority thereby conferred upon the Commission. They relate exclusively to transportation conditions and provide for the interchange of certain through traffic between interstate carriers on a nondiscriminatory basis. Preservation of competition is a factor which the Commission may properly consider in passing upon the public interest involved in the acquisition of control of another carrier. The conditions are not in conflict with the long-haul provision of Section 15 (4) of the Interstate Commerce Act since the Commission's order in the Clinchfield

Lease case did not require the applicants to establish, without their consent, any through route which did not embrace substantially the entire length of their lines.

III. The restrictive routing schedules which the Commission ordered cancelled were filed as supplements to tariffs which had previously established through routes and joint rates applicable over the Greenwood extension. The provisions of Section 15 (3) of the Interstate Commerce Act requiring a finding of public interest prior to the establishment by the Commission of new through routes are therefore inapplicable.

IV. When the Georgia & Florida applied to the Commission for approval of an extension of its line to Greenwood, the Atlantic Coast Line did not respond to the Commission's invitation to state its objections, if any, to the proposed extension. The Atlantic Coast Line was charged with knowledge that the construction of this extension would be justified only on the assumption that it could participate in through traffic via the Clinchfield. Its silence when the construction was under consideration reasonably implied acquiescence in the view that the extension was within the protection of the conditions attached to the Commission's approval of the Clinchfield lease.

After the Greenwood extension had been practically completed the Atlantic Coast Line and the other appellants, whom it controls, brought this suit in equity alleging that the conditions of the

Clinchfield lease do not apply to the Greenwood extension. Appellants are estopped from maintaining this suit since their previous silence, when under a duty to speak, has led the Georgia & Florida materially to change its position. But even if they are not equitably estopped, a court of equity will not aid a complainant whose previous conduct makes the assertion of his rights unconscionable.

ARGUMENT

I

THE GREENWOOD EXTENSION OF THE GEORGIA & FLORIDA IS WITHIN THE PROTECTION OF THE CONDITIONS WHICH THE COMMISSION ATTACHED TO ITS APPROVAL OF THE CLINCHFIELD LEASE

The Commission approved the Clinchfield lease subject to acceptance by the applicants of five conditions. Condition 1 requires the maintenance of a separate organization for the Clinchfield so that the road "shall constitute a separate operating unit, having a responsible management directly in charge of the operations of such properties." (R. 91.) Conditions 2 and 5 do not concern the present controversy.

Condition 3 requires the continuance of existing routes and channels of trade, existing gateways for the interchange of traffic, and "the present neutrality of handling traffic inbound and outbound" so as to permit equal service, routing, and movement of competitive traffic to and from all connect-

ing lines reached by the Clinchfield. It reads (R. 91):

> So far as lies within the power of the applicants, existing routes and channels of trade and commerce heretofore established by other carriers in connection with the Clinchfield shall be preserved, existing gateways for the interchange of traffic with such other carriers shall be maintained, and the present neutrality of handling traffic inbound and outbound by the Carolina, Clinchfield & Ohio Railway and its subsidiary, the Carolina, Clinchfield & Ohio Railway of South Carolina, shall be continued so as to permit equal opportunity for service and routing or movement of traffic which is competitive with traffic of the applicants, or either of them, to and from all connecting lines reached by the line of the Clinchfield companies, without discrimination in service against such competitive traffic.

Condition 4 requires applicants to permit carriers then connecting with the Clinchfield, or which may thereafter connect with it, to participate, without discrimination, in through routes and joint rates on traffic moving over the Clinchfield as an intermediate road between points at and beyond the Ohio River, on the one hand, and points in southeastern and Carolina territory, on the other. It declares that the purpose is to have the Clinchfield maintained as an open route for traffic between the points designated, equally available to all car-

riers connecting with it. The condition reads (R. 91–92):

> The applicants shall permit the line of the Clinchfield and its subsidiaries to be used as a link for through traffic, via existing gateways of interchange, or via such gateways as may hereafter be established under authority of the commission by means of the connecting lines which the Louisville & Nashville Railroad Company proposes to build, equally available to such other carriers, now connecting, or which may hereafter connect, with the line of the Clinchfield and its subsidiaries, as may desire to participate in through routes and joint rates between points in territory north and west of the line of the Clinchfield and points at and beyond the Ohio River, on the one hand, and points in the southeastern and Carolina territory, on the other, under divisions to be agreed upon by the applicants, or either of them, and/or the Clinchfield organization, on the one hand, and by the other participating carrier or carriers on the other, and shall not discriminate as to rates, fares, and charges against such participating carrier or carriers as compared with the applicants, or either of them; the intention of this provision being that the line of the Clinchfield and its subsidiaries shall be maintained as an open route equally available to all carriers connecting with the Clinchfield for traffic between the points designated.

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Appellants stand on a narrow and technical construction of these conditions. They urge, in effect, that even if the Commission intended to keep the Clinchfield open, without discrimination, to all carriers desiring to use it as a link in a through route between the territory north of the Ohio River and the Southeast, the conditions can not be construed so as to apply to the Greenwood extension of the Georgia & Florida. They contend that their requirements are limited to "connecting" lines and therefore do not cover a railroad connecting with the Clinchfield only through the medium of an intermediate line.

It is, we submit, clear that the Commission intended to protect through traffic over the contemplated Greenwood extension. The Georgia & Florida was one of the three carriers which intervened in opposition to the Clinchfield lease. (R. 69.) It then announced its purpose of seeking approval of an extension of its line to Greenwood and expressed apprehension that, if the Clinchfield were unconditionally leased, this extension would be discriminated against in favor of the Charleston (controlled[4] by the Atlantic Coast Line) in the matter of joint rates. (R. 20.) The lease

[4] When we refer in this brief to control of the Charleston by the Atlantic Coast Line, we mean that the stock of both companies is owned by substantially the same interests. (R. 24.) We do not thereby concede that the Charleston was operated by the Atlantic Coast Line "under a common management or control" within the meaning of Section 15 (4) of the Act.

was opposed on the ground that it would destroy potential, as well as actual, routes. (R. 85.) Conditions 3 and 4 were imposed to meet this objection. (R. 28.) Since the Georgia & Florida is not separately mentioned, it is plain that the Commission believed that its interests were being protected as fully as those of the other protesting carriers.

In the present case the Commission, after quoting that part of its lease report which stated the position of those opposed to an unconditional lease, said (R. 28–29):

> The conditions imposed, and accepted by the Coast Line and the L. & N., were intended to provide in substance for the advantages thus requested, and, fairly construed, should have that effect. Their purpose was to preserve the relationships then existing between the Clinchfield, on the one hand, and the public and connecting lines of railroad on the other hand, which were the relationships usually and normally existing between independent railroads and those whom it serves.

The Commission rejected appellants' construction of the term "connecting." It said (R. 28–29):

> There is no warrant for limiting the meaning of "connecting lines" to the direct connections of the Clinchfield. The term is commonly used in referring to the lines in general making up a through route. There is in fact no other convenient term. The technical nature of this contention of respondents becomes apparent when it is con-

sidered that under their construction the conditions would necessarily apply to any extension of operations by the Piedmont, regardless of effect in short hauling the Coast Line.

Black v. *Delaware & Raritan Canal Co.*, 22 N. J. Eq. 130, 398, 402, held that two railroads connected only by means of intervening roads were "connected" within the meaning of a New Jersey statute permitting consolidation of railroads "whose works shall form with their own connected or continuous lines."

The Commission found that as an independent line the Clinchfield would welcome an additional competing route for the movement of its traffic to and from the territory served by the Georgia & Florida. (R. 29.) It pointed out that the proposed restriction of routing would, therefore, seriously impair the obligation, imposed by condition 3, to continue the "present neutrality" of the Clinchfield in handling traffic. (R. 29.)

We also submit that through traffic over the Greenwood extension is within the protection of the conditions attached to the Clinchfield lease even if the protection there given is limited to lines physically connecting with the Clinchfield. The Piedmont, by reason of its connection with the Clinchfield on the north and with the Georgia & Florida on the south, is part of a through route between points at and north of the Ohio River and points

in the Southeast. The restrictive schedules filed by appellants closing the Greenwood extension to joint rates on through traffic between these points prevent the Piedmont from participating in this through traffic via its connection with the Georgia & Florida at Greenwood. Appellants can not close the Piedmont line to this through traffic by restrictions preventing it from interchanging traffic with the Georgia & Florida on the basis of joint rates. The conditions of the Clinchfield lease require that road to be maintained "as an open route equally available to all carriers connecting with the Clinchfield for traffic between the points designated." (R. 92.) It is not so equally available if the Atlantic Coast Line system can reach the Southeast on joint rates but the Piedmont can not reach the same region, via the Georgia & Florida, on the same joint rates.

The wording of conditions 3 and 4 in the Commission's report differs slightly from the wording of these conditions in the preliminary proposal which it submitted to the parties in the lease proceeding. Appellants contend (brief, pp. 15–22) that the conditions as adopted do not have the same meaning as the conditions originally proposed and also contend (brief, pp. 17, 22) that the changes made in each condition met the principal objection thereto of the lessees. The Commission in its report on the lease said (R. 92):

> The applicants have protested vigorously against the imposition of conditions 3 and 4.

> We have considered fully their representations, however, and have reached the conclusion that without the observance of these conditions by the applicants we are unable to find that the proposed acquisition of control would be in the public interest.

The changes in wording were considered so unimportant that they are not even mentioned by the Commission. The Commission noted the applicants' objections to the conditions and stated that it had nevertheless determined to adhere to them. Not only did the Commission put the lessees on notice that it had not met their objections to the conditions but the changes themselves do not in any way support appellants' contention.

The Commission made three changes in condition 4.[5] The first and last broaden its scope. The second, upon which appellants rely, substitutes "and" for "which." It seems unlikely that this was intended to effect a change in meaning. If so, the prohibition against discrimination was made

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[5] The following shows the changes, words added being italicized and words omitted being enclosed in brackets:

The applicants shall permit the line of the Clinchfield and its subsidiaries to be used as a link for through traffic, via existing gateways of interchange, or via such gateways as may hereafter be established under authority of the Commission by means of the connecting lines which the Louisville & Nashville Railroad Company proposes to build, equally available to such other carriers now connecting, or which may hereafter connect, with the line of the Clinchfield and its subsidiaries, as may desire to participate in through routes and joint rates between points in territory north and west of the line of the Clinchfield and points at and beyond

general instead of being limited to discrimination in the division of joint rates and the scope of the condition was broadened, not narrowed.

The changes in condition 3 are equally unimportant.[6]

The condition as adopted requires existing routes, gateways of interchange, and the present neutrality

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the Ohio River on the one hand and points in the southeastern *and Carolina* territory on the other, under divisions to be agreed upon by the applicants, or either of them, and/or the Clinchfield organization on the one hand and by the other participating carrier or carriers on the other, [which] *and* shall not discriminate as to rates, *fares and charges* against such participating carrier or carriers as compared with the applicants, or either of them; the intention of this provision being that the line of the Clinchfield and its subsidiaries shall be maintained as an open route equally available to all carriers connecting with the Clinchfield for traffic between the points designated. (R. 45, 91–92.)

[6] The following shows the changes, words added being italicized and words omitted being enclosed in brackets:

So far as lies within the power of the applicants, existing routes and channels of trade and commerce heretofore established by other carriers in connection with the Clinchfield shall be preserved, existing gateways for the interchange of traffic with such other carriers shall be maintained, and the present neutrality of handling traffic inbound and outbound by the Carolina, Clinchfield & Ohio Railway and its subsidiary, the Carolina, Clinchfield & Ohio Railway of South Carolina, shall be continued so as to permit equal opportunity for service *and routing or movement of traffic which is competitive with traffic of the applicants or either of them* to and from all connecting lines reached by the line of the Clinchfield Companies without discrimination [as to routing or movement of traffic which is competitive with traffic of the applicants or either of them, and without discrimination] *in service* against such competitive traffic [in arrangement of schedule]. (R. 41–42, 91.)

of handling traffic to be continued so as to permit equal opportunity for service " and routing or movement of traffic which is competitive with traffic of the applicants, or either of them." The quoted words were added; they originally appeared in a later qualifying prepositional clause. The obligation to afford equal opportunity for routing and movement of competitive traffic was therefore made direct instead of indirect. In addition, discrimination "in service" instead of discrimination "in arrangement of schedule" was prohibited. Certainly these changes did not narrow the scope of the condition.

Appellants also contend (brief, pp. 36–37) that conditions 3 and 4 are inconsistent with the Commission's findings in the Clinchfield Lease case. The provisions of these conditions that the Clinchfield retain the status of an independent road in the matter of certain through routing is alleged to be inconsistent with the Commission's finding that the usefulness of the Clinchfield would be circumscribed as long as it continued independent. There is no inconsistency here. The Commission was weighing various "conflicting interests in order to determine the ultimate public interest." (R. 77.) On the one hand, the Clinchfield was not receiving its proportionate share of through traffic because its connections generally preferred longer hauls by more circuitous routes over their own lines. (R. 84, 89.) On the other hand, unconditional approval of the lease might "destroy certain existing and

potential routes, withdraw effective competition as to large areas reached by the Coast Line, and give the Coast Line an undue advantage in transportation in the Southeast." (R. 85.) Weighing these considerations, the Commission found the latter were important; it explicitly said that the lease would be in the public interest only upon the conditions set forth in its report. (R. 91, 93.)

The District Court said that the failure of the Atlantic Coast Line to protest when authorization to build the Greenwood extension was pending before the Commission "is a pertinent matter for consideration in determining the meaning of the conditions." (R. 141.) Appellants (brief, pp. 44–45) take exception to this statement. But they are faced with this dilemma. Either the lessees then construed the conditions as they have been construed by the Commission and the District Court, in which case the lessees' interpretation of the lease when the question first arose is material in determining the meaning of the conditions; or the lessees then held their present view, in which case they can not obtain the aid of a court of equity in enforcing rights the assertion of which is unconscionable because their past silence has led the Georgia & Florida to change its position. We urge later (*infra*, pp. 28–32) that if the lessees have always believed that they were entitled to discriminate against the Greenwood extension they have been under a duty to speak from the time when the

building of that extension was first presented to the Commission.

II

THE CONDITIONS UPON WHICH THE COMMISSION APPROVED A LEASE OF THE CLINCHFIELD WERE WITHIN ITS STATUTORY AUTHORITY

Section 5 (2) of the Interstate Commerce Act (*infra*, p. 34) provides that whenever the Commission, after hearing, is of the opinion that the acquisition by one carrier of the control of another under a lease will be in the public interest, it may authorize such acquisition "on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises." We submit that conditions 3 and 4 of the Clinchfield lease are well within the power conferred upon the Commission by these provisions of the Act.

The conditions relate to interstate commerce and to the rights and duties of carriers engaged in interstate commerce. They provide for the interchange of traffic between the Clinchfield and other interstate carriers on a nondiscriminatory basis. The Commission permitted a control of the Clinchfield which would serve the purposes advanced by the Atlantic Coast Line and the Louisville & Nashville as reasons for the lease provided they were willing to maintain actual and potential competitive relationships which depended upon a continuance of equal opportunity to participate in through joint rates over the Clinchfield. That preservation of

competition is a factor which may properly be considered by the Commission in passing upon the public interest involved in the acquisition of control of a railroad is shown by Section 5 (4) of the Interstate Commerce Act (c. 91, 41 Stat. 456, 481). After authorizing the Commission to prepare a plan for the consolidation of railroads into a limited number of systems, it provides:

> In the division of such railways into such systems under such plan, competition shall be preserved as fully as possible and wherever practicable the existing routes and channels of trade and commerce shall be maintained.

Where a proposed acquisition of control would tend to create a local monopoly of railroad transportation, contrary to the public interest, the Commission should be particularly zealous to guard against this result since, by virtue of Section 5 (8) of the Act (c. 91, 41 Stat. 456, 482), anything done pursuant to an order of the Commission authorizing acquisition of control of another carrier is relieved from the operation of the Federal "antitrust laws."

Chesapeake & Ohio Ry. Co. v. *United States,* 283 U. S. 35, held that the Commission, in reaching a determination that proposed extensions of railroad lines are required by the public interest, may properly consider the desirability of preserving competition between rival railroad systems.

The conditions which the Commission attached to its approval of the Clinchfield lease are not in

conflict with the provisions or policy of Section 15 (4) of the Act (*infra,* p. 35), which prohibit requiring a carrier to establish, "without its consent," any through route which does not embrace substantially the entire length of its line (including lines of controlled carriers) between the termini of the proposed route. The Commission's order in the Clinchfield Lease case did not require the Atlantic Coast Line or the Louisville & Nashville to abandon any protection given by Section 15 (4) in respect of their existing lines. In respect of the Clinchfield, the order of the Commission gave these carriers the option of consenting to certain through routing over that road or abandoning their plan to lease that road, a plan which, without such consent, was not in the public interest and, therefore, could not be approved by the Commission. See *Chicago Junction Case,* 264 U. S. 258, 265.

The conditions were not imposed arbitrarily. They were requested by interested carriers and were based on a study of transportation conditions which, in the opinion of the Commission, necessitated the conditions if the lease was to be in the public interest.

As the District Court said, *United States* v. *Chicago, Milwaukee & Pacific R. R. Co.,* 282 U. S. 311, "is not remotely in point." (R. 145.) That case held that part of a condition attached to an order of the Commission approving the issuance of certain railroad securities was beyond the power of the

Commission and should be set aside. The basis of the decision is that by the condition the Commission attempted to control the disposition of a fund created by a contract which was not one in respect of interstate commerce, to which the carrier in question was not a party and in which it had no enforceable interest. It was therefore held that the Commission had not acted within the constitutional grant of authority to regulate interstate commerce.

III

THE ORDER OF THE COMMISSION IN THIS CASE DOES NOT HAVE THE EFFECT OF ESTABLISHING NEW THROUGH ROUTES AND THE PROVISIONS OF SECTION 15 (3) OF THE INTERSTATE COMMERCE ACT DO NOT APPLY

Appellants contend (brief, pp. 46–48) that the Commission's order is invalid because it had the effect of directing the establishment of new through routes without the finding of public interest required by Section 15 (3) of the Interstate Commerce Act (*infra,* p. 34). The Commission sustained this contention as to 33 of the 337 schedules originally involved, on the ground that the Georgia & Florida was not a party to these 33 schedules. (R. 15.) The Commission rejected the contention as to the remaining schedules on the ground that they were filed as supplements to tariffs which had previously established through routes and joint rates which would automatically become applicable over the Greenwood extension upon its opening. (R. 14, 15.)

These restrictive schedules therefore stated a new regulation or practice affecting existing rates and charges within the meaning of Section 15 (7) of the Act (*infra*, p. 37) and the requirements of Section 15 (3) are inapplicable to these schedules. Through routes and joint rates named in tariffs which have been filed with the Commission constitute existing routes and rates, although there has been no movement of traffic thereunder. See *Virginian Railway Co.* v. *United States*, 272 U. S. 658, 666.

The action of the Commission did not open new routes, because the restrictive schedules which it ordered cancelled were supplements to tariffs to which the Georgia & Florida was a party. Where an unrouted tariff is concurred in by a number of carriers freight may be routed over an extension of any such carrier even though the extension was built after the tariff concurrence. This is accepted tariff practice. See Commission's Tariff Circular 20, Rule 64.

IV

THE SILENCE OF APPELLANTS WHEN THEY WERE UNDER A DUTY TO SPEAK ESTOPS THEM FROM MAINTAINING THIS SUIT OR AT LEAST RENDERS THEIR PRESENT ASSERTION OF RIGHTS SO UNCONSCIONABLE THAT THEY CAN NOT INVOKE THE AID OF A COURT OF EQUITY.

When the Georgia & Florida applied to the Commission for permission to extend its line from Augusta to Greenwood the Atlantic Coast Line knew that this carrier, in opposing an unconditional

lease of the Clinchfield, had attached importance to the right of this extension, when constructed, to participate in joint rates on through traffic via the Clinchfield. It knew that the building of the proposed extension might be, as the Commission found, a matter of life and death to the Georgia & Florida and to the territory which it served, the road having been operated by receivers at a loss since 1915.[1] It knew that the conditions attached to the authorization of the Clinchfield lease might be interpreted as entitling the Greenwood extension to participate on equal terms in joint rates on through traffic moving over the connected lines of the Clinchfield, the Piedmont, and the Greenwood extension.

The construction of the Greenwood extension was justified only on the assumption that it could participate in through traffic passing over the Clinchfield. (R. 142.) The Atlantic Coast Line could not be blind to this situation. It knew the traffic and revenue possibilities of the region since the Charleston, which it controlled, operated a line between Augusta and Greenwood.

We submit that under these circumstances the Atlantic Coast Line was under a duty, if it interpreted the Clinchfield lease to permit discrimination against the Greenwood extension, to declare its construction of the lease. Its silence might not only interfere with a proper exercise of the duty imposed

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[1] *Reorganization and Extension of Georgia & Florida Ry.*, 117 I. C. C. 473, 474, 486–487, *supra*.

upon the Commission to determine whether public convenience and necessity required the extension, but might also lead the Georgia & Florida and investors in its securities into needless loss. The Atlantic Coast Line nevertheless did not appear at the hearing or respond to the Commission's invitation to state its objections, if any, to the proposed extension.[8] So far as the record shows this silence continued until the present proceedings commenced, when the extension had been practically completed at a cost of about $3,300,000. (*Supra*, p. 9.)

Appellants contend (brief, pp. 44–45) that their silence was justified because the Commission did not consider in the construction case what specific through routes and joint rates would be applicable over the extension. But it did take judicial notice of its findings in the Clinchfield Lease case and its principal reason for approving the construction was the expected "substantial participation" by the extension in through traffic via the Clinchfield, an expectation which could not be realized if the extension was not entitled to equal joint rates on this traffic. (R. 22–23, 142.)

Equity will not allow a person who has assumed a legal position, upon which another party has relied, to change his position to the prejudice of that other party. *Davis* v. *Wakelee*, 156 U. S. 680. In *Swain* v. *Seamens*, 9 Wall. 254, 274, this Court, in

[8] *Reorganization of Extension of Georgia & Florida Ry.*, 117 I. C. C. 473, 478–479, *supra*.

holding that estoppel was a complete answer to the defense of the statute of frauds, said:

> Where a person tacitly encourages an act to be done, he can not afterwards exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the other party to change his position, so that he will be pecuniarily prejudiced by the assertion of such adversary claim.

This is a suit in equity under the Act of October 22, 1913, to enjoin an order of the Interstate Commerce Commission. The ordinary principles of equity apply to such a suit. In *Alabama* v. *United States,* 279 U. S. 229, 230, this Court said with reference to an application for a temporary injunction in a suit brought under that Act:

> But there is nothing in the legislation to suggest that in the exercise of the judicial power in respect of such writs pertinent principles of equity as theretofore understood, are to be disregarded or modified.

We do not assume any intentional bad faith on the part of the Atlantic Coast Line in failing to make known its position when the Georgia & Florida sought approval of the Greenwood extension. But we do contend that the Atlantic Coast Line was silent when it was under duty to speak, that this silence reasonably implied acquiescence in the view that the Greenwood extension would be within the protection of the conditions attached to the Clinchfield lease, that the Georgia & Florida relied upon

such protection in constructing the extension, and that it is unconscionable for the Atlantic Coast Line and the other appellants, whom it controls, now to deny that the extension is protected by the conditions of the lease.

He who comes into equity must come with clean hands. In *National Fire Insurance Co.* v. *Thompson,* 281 U. S. 331, 338, the Court in affirming a decree denying an interlocutory injunction said:

> Courts of equity frequently decline to interfere on behalf of a complainant whose attitude is unconscientious in respect of the matter concerning which it seeks relief.

In *Deweese* v. *Reinhard,* 165 U. S. 386, 390, the Court said:

> A court of equity acts only when and as conscience commands, and if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses and whatever use he may make of them in a court of law, he will be held remediless in a court of equity.

We submit that appellants are equitably estopped from maintaining the present suit. But even if appellants are not estopped, we submit that their conduct makes the assertion of their rights highly inequitable and unconscionable and that a court of equity will not aid in the enforcement of such rights.

CONCLUSION

It is respectfully submitted that the decree below should be affirmed.

THOMAS D. THACHER,
Solicitor General.
JOHN LORD O'BRIAN,
The Assistant to the Attorney General.
CHARLES H. WESTON,
Special Assistant to the Attorney General.
DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission,
H. L. UNDERWOOD,
Attorney,
Interstate Commerce Commission,
Of Counsel.

NOVEMBER, 1931.

APPENDIX

The Interstate Commerce Act provides:

SEC. 5. (2) Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises. (C. 91, 41 Stat. 481, U. S. C., Title 49, Sec. 5 (2).)

SEC. 15. (3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property, or the maxima or minima, or maxima and minima, to be charged (or, in the case of

a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated; and this provision, except as herein otherwise provided, shall apply when one of the carriers is a water line. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character; nor shall the Commission have the right to establish any route, classification, or practice, or any rate, fare, or charge when the transportation is wholly by water, and any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water. (C. 3591, 34 Stat. 589; c. 309, 36 Stat. 551; c. 91, 41 Stat. 485; U. S. C., Title 49, Sec. 15 (3).)

SEC. 15. (4) In establishing any such through route the Commission shall not (except as provided in Section 3, and except where one of the carriers is a water line), require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable

through route which could otherwise be established: *Provided,* That in time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest. (C. 309, 36 Stat. 552; c. 91, 41 Stat. 485; U. S. C., Title 49, Sec. 15 (4).)

SEC. 15. (7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not

for a longer period than one hundred and twenty days beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. * * * (C. 309, 36 Stat. 552; c. 91, 41 Stat. 486; U. S. C., Title 49, Sec. 15 (7).)

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CHARLES ELMORE CROPLEY
CLERK

No. 88

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931

ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, AND CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY, *Appellants*,

VS.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *et al.*, *Appellees*

BRIEF ON BEHALF OF PIEDMONT & NORTHERN RAILWAY COMPANY, GEORGIA & FLORIDA RAILROAD, AND W. V. GRIFFIN AND H. W. PURVIS, AS RECEIVERS OF GEORGIA & FLORIDA RAILROAD, APPELLEES.

W. S. O'B. ROBINSON, JR.,
Attorney for Piedmont and Northern Railway Company, *Appellee*.
JAMES M. HULL, JR.,
GEORGE B. BARRETT,
J. J. WILLINGHAM,
Attorneys for Georgia and Florida Railroad and W. V. Griffin and H. W. Purvis, as its Receivers, *Appellees*.

Charlotte, N. C.,
November 17, 1931.

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ARGUMENT:

1. The restrictive schedules would have impaired the neutrality of the Clinchfield Railroad, in violation of Condition 3 of the Clinchfield Lease, and would have excluded the Greenwood extension of the Georgia & Florida Railroad and the Piedmont & Northern Railway Company from participating, in connection with the Clinchfield Railroad, in through routes and joint rates between the points designated in Condition 4 in violation of that condition 11

2. The contentions of appellants that the conditions do not require the lessees to embrace the Clinchfield Railroad in any through routes which would short haul other lines of the lessees, or either of them, except routes in existence at the time of the lease, and that the conditions as interpreted and construed by the Commission and the District Court were beyond the Commission's authority, are completely answered by the report of the Commission (R. 14), and the opinion of the District Court (R. 135) 15

3. The Commission and the District Court correctly interpreted the terms "connecting lines reached by the line of the Clinchfield," and "Carriers, now connecting, or which may hereafter connect, with the line of the Clinchfield," as including the Greenwood extension of the Georgia & Florida Railroad within the scope of their meaning 24

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vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, PIEDMONT & NORTHERN RAILWAY COMPANY, GEORGIA & FLORIDA RAILROAD, AND W. V. GRIFFIN AND H. W. PURVIS, Receivers of Georgia & Florida Railroad, *Appellees*.

BRIEF ON BEHALF OF PIEDMONT & NORTHERN RAILWAY COMPANY, GEORGIA & FLORIDA RAILROAD, AND W. V. GRIFFIN AND H. W. PURVIS, AS RECEIVERS OF GEORGIA & FLORIDA RAILROAD, APPELLEES.

STATEMENT OF CASE

This is an appeal by the plaintiffs from a decree of the District Court, for the Western District of South Carolina. The suit in which the decree was entered was instituted by the Atlantic Coast Line

Railroad Company, Louisville & Nashville Railroad Company, and Charleston & Western Carolina Railway Company, against The United States, to set aside and enjoin the enforcement of an order of the Interstate Commerce Commission which required the plaintiffs, and other carriers who were respondents in the proceeding before the Commission, to cancel certain schedules filed as amendments to joint tariffs theretofore filed with the Commission.

The Interstate Commerce Commission, Piedmont & Northern Railway Company, Georgia & Florida Railroad, and W. V. Griffin and H. W. Purvis, in their representative capacities as Receivers of the Georgia & Florida Railroad, intervened as defendants in support of the order of the Commission.

The District Court adopted the Commission's findings of fact, and for the reasons set forth in the opinion of the court refused to enjoin the enforcement of the order, and entered its decree dismissing the bill of complaint (R. 147).

The schedules, which the Commission directed to be cancelled, were designed to cause through traffic passing over the Clinchfield Railroad, which extends from Elkhorn City, Kentucky, to Spartanburg, South Carolina, to be routed between Augusta, Georgia, and Spartanburg, South Carolina, over the line of the Charleston & Western Carolina Railway Company, to the exclusion of the line of the Georgia & Florida Railroad and the Piedmont & Northern Railway Company, consisting of the Greenwood extension of the

Georgia & Florida Railroad between Augusta, Georgia, and Greenwood, South Carolina, and the line of the Piedmont & Northern Railway Company between Greenwood and Spartanburg (R. 8, 14, 136).

The proposed schedules would have accomplished this purpose by inserting in the tariffs restrictions providing that the joint rates published in the tariffs would not apply over the Greenwood extension between Augusta, Georgia, and Greenwood, South Carolina (R. 14, 16).

Before the construction of the Greenwood extension the Piedmont & Northern Railway Company had no connection at Greenwood, South Carolina, with whom it could handle through traffic moving in connection with the Clinchfield Railroad to, from or through Spartanburg. The Greenwood extension was constructed under authority granted by the Interstate Commerce Commission in re-organization of Georgia & Florida Railway (117 I. C. C., 477), and was completed and put in operation on June 1, 1929, and on its completion provided, together with the Piedmont & Northern Railway Company, a new line of railroad between Augusta, Georgia, and Spartanburg, South Carolina, roughly paralleling the Charleston & Western Carolina Railway Company between these points and competing with it in the interchange of through traffic with the Clinchfield Railroad at Spartanburg (R. 7).

The restrictive schedules were filed shortly before the completion of the extension; they would have become effective on its completion; and would have

frustrated the purpose for which the extension was constructed (R. 14, 22, 23).

Appellants urge in justification of the restrictive schedules that the Clinchfield Railroad and the Charleston & Western Carolina Railway are operated in conjunction with and under the management or control of the Atlantic Coast Line Railroad Company, within the meaning of Sec. 15(4) of the Interstate Commerce Act, as amended by Transportation Act of 1920 [49 U. S. C. A., 15(4)], and that to allow the Piedmont & Northern and Georgia & Florida between Augusta and Spartanburg to participate in through traffic passing over the Clinchfield under joint rates, requires the Atlantic Coast Line without its consent to accept a short haul on such traffic, in violation of the provisions of Sec. 15(4) (R. 136).

The Clinchfield Railroad, which is owned by the Carolina, Clinchfield & Ohio Railway Company, and its subsidiaries, was leased, in 1924, for the term of 999 years, to the Atlantic Coast Line Railroad Company and the Louisville & Nashville Railroad Company as joint lessees, pursuant to authority granted by the Interstate Commerce Commission in Clinchfield Railway Lease (90 I. C. C., 113); but in approving the lease the Commission imposed certain conditions which it found to be necessary in the public interest, and to which the lessees were required to consent (R. 67, 91, 92, 99):

Conditions 1, 3 and 4, which are the ones pertinent here, are as follows:

"1. The applicants shall establish and maintain a separate organization for the combined properties of the Carolina, Clinchfield & Ohio Railway and its subsidiaries, so that the three companies shall constitute a separate operating unit, having a responsible management directly in charge of the operations of such properties.

"3. So far as lies within the power of the applicants, existing routes and channels of trade and commerce heretofore established by other carriers in connection with the Clinchfield shall be preserved, existing gateways for the interchange of traffic with such other carriers shall be maintained, and the present neutrality of handling traffic inbound and outbound by the Carolina, Clinchfield & Ohio Railway and its subsidiary, the Carolina, Clinchfield & Ohio Railway of South Carolina, shall be continued so as to permit equal opportunity for service and routing or movement of traffic which is competitive with traffic of the applicants, or either of them, to and from all connecting lines reached by the line of the Clinchfield companies, without discrimination in service against such competitive traffic.

"4. The applicants shall permit the line of the Clinchfield and its subsidiaries to be used as a link for through traffic, via existing gateways of interchange, or via such

gateways as may hereafter be established under authority of the Commission by means of the connecting lines which the Louisville & Nashville Railroad Company proposes to build, equally available to such other carriers, now connecting, or which may hereafter connect, with the lines of the Clinchfield and its subsidiaries, as may desire to participate in through routes and joint rates between points in territory north and west of the line of the Clinchfield and points at and beyond the Ohio River on the one hand and points in southeastern and Carolina territory on the other, under divisions to be agreed upon by the applicants, or either of them, and/or the Clinchfield organization, on the one hand, and by the other participating carrier or carriers on the other, and shall not discriminate as to rates, fares, and charges against such participating carrier or carriers as compared with the applicants, or either of them; the intention of this provision being that the line of the Clinchfield and its subsidiaries shall be maintained as an open route equally available to all carriers connecting with the Clinchfield for traffic between the points designated."

The Commission ordered that the restrictive schedules be cancelled as violative of Conditions 3 and 4, and the District Court refused to enjoin the enforcement of the Commission's order and dismissed the bill of complaint for the same reason.

The Commission found the facts as to the relationships existing among the Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company, Clinchfield Railroad and Charleston & Western Carolina Railway Company (R. 23, 24, 25); but in view of its ruling that the proposed schedules were violative of the conditions of the Clinchfield Lease it did not discuss or decide the question as to whether on the facts found the Clinchfield Railroad and the Charleston & Western Carolina Railway are operated in conjunction with and under the management or control of the Atlantic Coast Line Railroad Company, within the meaning of Sec. 15(4) (R. 30). But the District Court went further, and on the facts found by the Commission did conclude that the Clinchfield Railroad and the Charleston & Western Carolina Railway are so operated by the Atlantic Coast Line Railroad Company within the meaning of that section (R. 139).

STATUTES

Section 5(2) of the Interstate Commerce Act, as amended by the Transportation Act of 1920 [41 Stat. 481, 49 U. S. C. A., 5(2)], under which the Commission acted in imposing the conditions in the Clinchfield Lease Case, provides:

> "Section 5(2). Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, that the acquisition, to the

extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises."

Section 15(7), under which the Commission acted in first suspending, and then, after hearing, ordering the cancellation of the restrictive schedules, so far as its provisions are relevant, provides:

"Section 15(7). Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concern-

> ing the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. . . . At any hearing involving a rate, fare, or charge increased after January 1, 1910, or of a rate, fare, or charge sought to be increased after the passage of this Act, the burden of proof to show that the increased rate, fare, or charge, or proposed increased rate, fare or charge, is just and reasonable shall be upon the carrier."

Section 15(4), on which appellants rely, provides that in establishing a through route—

> "the Commission shall not (except as provided in Section 3, and except where one of the carriers is a water line), require any car-

rier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established."

ARGUMENT

I

The Restrictive Schedules Would Have Impaired the Neutrality of the Clinchfield Railroad, in Violation of Condition 3 of the Clinchfield Lease, and Would Have Excluded the Greenwood Extension of the Georgia and Florida Railroad and the Piedmont and Northern Railway Company From Participating, in Connection With the Clinchfield Railroad, in Through Routes and Joint Rates Between the Points Designated in Condition 4 in Violation of That Condition.

Appellants do not challenge the correctness of the following statement from the opinion of the District Court:

> "The through routes and rates in question, 304 in number, were established by joint tariffs in which the complainants (the appellants), the P. & N. and G. & F. participated, and which were filed prior to the completion of the Greenwood extension of the G. & F. between Greenwood and Augusta. They applied to traffic passing over the C. C. & O. between points at and beyond the Ohio River on the one hand and points in south-eastern and Carolina territory on the other. Prior to the completion of the Greenwood extension, the natural course of this traffic between Spartanburg and Greenwood was over the line of the C. & W. C. The Greenwood extension was completed and opened to traffic

on June 1, 1929; and a route via the P. & N. from Spartanburg to Greenwood and via the G. & F. from Greenwood to Augusta thereupon became automatically available for this through traffic passing over the C. C. & O. under the through routes and rates theretofore published. It was to exclude this route from the provisions of the tariffs establishing through routes and rates that the restrictive schedules were filed by the complainants."

Condition 4 of the Clinchfield Lease requires that the line of the Clinchfield shall be maintained as an open route equally available to all carriers then connecting, or which might thereafter connect with the line of the Clinchfield, for traffic between "points at and beyond the Ohio River on the one hand and points in the southeastern and Carolina territory on the other," and that the lessees shall not discriminate as to rates, fares, and charges against such participating carrier or carriers as compared with themselves or either of them.

The restrictive schedules would have prevented the route via the P. & N. from Spartanburg to Greenwood and via the G. & F. from Greenwood to Augusta from participating, in connection with the Clinchfield, in through routes and joint rates on traffic between the points designated in Condition 4.

Condition 3 requires that the neutrality of handling traffic inbound and outbound by the Carolina, Clinchfield & Ohio Railway, and its subsidiary, the Caro-

lina, Clinchfield & Ohio Railway Company of South Carolina, as it existed at the time of the lease, shall be continued so as to permit equal opportunity for service and routing or movement of traffic which is competitive with traffic of the lessees or either of them, to and from all connecting lines reached by the line of the Clinchfield Companies, without discrimination in service against such competitive traffic.

The Commission found as a fact, on the evidence introduced before it, that the restrictive schedules would impair this neutrality (R. 29).

This finding was adopted by the District Court (R. 147); it was not challenged by appellants; and cannot now be challenged by them, because the evidence on which it was made is not before the court (*Edward Hines Yellow Pines Trustees* v. *United States*, 263 U. S., 143; *Louisiana & Pine Bluff R. Co.* v. *United States*, 257 U. S., 114).

Appellants allege that the "Greenwood extension, when constructed and put into operation on June 1, 1929, for the first time provided, together with the Piedmont & Northern Railway Company, a new line of railroad between Augusta, Ga., and Spartanburg, S. C., roughly paralleling the line of the Charleston & Western Carolina Railway Company between said points" (R. 7); that the restrictive schedules were "designed and appropriate to make the through rates, published by or for the account of said railroads (A. C. L. Railroad Company, C. & W. C. Railway Com-

pany, Georgia Railroad, and Clinchfield Railroad), on traffic moving northbound or southbound over the Clinchfield Railroad from, to or through Augusta, Ga., not applicable if the traffic was moved between Greenwood, South Carolina, and Augusta, Georgia, over the Greenwood extension of the Georgia & Florida Railroad. The purpose of these restrictions was to preserve to the Atlantic Coast Line Railroad Company and its system line, the Charleston & Western Carolina Railway, the long haul protected by the provisions of paragraph 4 of Section 15 of the Interstate Commerce Act" (R. 8).

They allege further that "the publication of said restrictive schedules did not close any route or channel of trade, or gateway for interchange of traffic which had theretofore been opened, nor in any way change any condition, with reference to the movement or handling of traffic via the line of the Clinchfield Railroad, in existence at the time of the lease authorized in the Clinchfield Lease Case" (R. 8); and allege that the Commission by its order "erroneously construed Conditions 3 and 4 of the Clinchfield Lease Case . . . as requiring the Atlantic Coast Line Railroad Company to embrace in through routes substantially less than the entire length of its railroad and of intermediate railroads operated in conjunction and under a common management and control therewith" (R. 2).

II

The Contentions of Appellants That the Conditions do Not Require the Lessees to Embrace the Clinchfield Railroad in Any Through Routes Which Would Short Haul Other Lines of the Lessees, or Either of Them, Except Routes in Existence at the Time of the Lease, and That the Conditions as Interpreted and Construed by the Commission and the District Court Were Beyond the Commission's Authority, Are Completely Answered by the Report of the Commission (R. 14), and the Opinion of the District Court (R. 135).

(1) Section 5(2) of the Interstate Commerce Act, as amended by the Transportation Act of 1920 [41 Stat. 481, 49 U. S. C. A., 5(2)], authorizes the Commission, as the District Court said:

> "to approve the acquisition by one carrier of the control of another by lease or otherwise 'on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises.' It is not only the right but the duty of the Commission to impose such conditions as will make the acquisition in the public interest; for, unless the acquisition is found to be in the public interest, the Commission cannot authorize it. Chicago Junction Case 264 U. S., 258, 265. In this case the Commission found that the lease would not be in the public interest unless the conditions in question were imposed; and consequently without them the lease could

not have been authorized. If they were beyond the power of the Commission, it results not that they are void and the lease unconditional, but that the lease itself is unauthorized. We think, however, that it was clearly within the power of the Commission to impose them.

"Complainants rely upon the recent decision of the Supreme Court in *U. S.* v. *Chicago, M., St. P. & P. R. Co.* ..... U.S., ..., 51 Sup. Ct. Rep. 159. That case, however, is not remotely in point. There the condition imposed related not to the control of interstate commerce, but to the disposition of a fund subscribed for a special purpose; and it was held that the condition was void because imposed without authority of law, in that it related to a contract which 'was not one in respect of commerce but involved a transaction distinct and complete in itself without regard to its results; and, whether succeeded by commerce or not, was no part of it.' Here the conditions relate directly to interstate commerce, prescribing how a line of railroad engaged in interstate commerce is to be operated with relation to other interstate carriers, and the manner in which interstate traffic over such line is to be handled. Their effect was to authorize the acquisition of the C. C. & O. by the A. C. L. and the L. & N. in such way as to enable those roads to serve

the purposes which they put forward as reasons for the acquisition and at the same time to preserve the independent status of the C. C. & O. for the benefit of the public and the protection of connecting carriers.

"It is argued that as construed by the Commission, the conditions in question are violative of Section 15(4) of the Interstate Commerce Act as amended by the Transportation Act of 1920 [49 U. S. C. A., 15(4)], in that they require the A. C. L. and the L. & N., without their consent, to embrace in through routes substantially less than the entire length of their lines and the lines of intermediate roads operated under a common management or control. The answer is that these carriers gave their consent to this when they accepted the C. C. & O. lease, one of the provisos of the order which approved the lease being as follows:

"'That the making of said lease and exercise of any of the rights conferred by this order shall in all future proceedings, judicial as well as administrative, to which the carriers above named or any of them may be parties, be deemed and taken as conclusive evidence of their acceptance of, and agreement to abide by, the conditions enumerated in said report, and numbered from 1 to 5, inclusive'" (R. 144, 145, 146).

The District Court said:

"The purpose of the conditions was to withhold from the lessees a partisan control of the C. C. & O. so that its line would remain available on equal terms to their competitors; and we think that this purpose was clearly expressed in the language of the conditions. The plain meaning of that language is that the existing neutrality of the C. C. & O. is to be continued 'so as to permit equal opportunity for service *and routing or movement* which is competitive with traffic of applicants' and that the line of the C. C. & O. is to be maintained 'as an open route equally available to all carriers connecting with the Clinchfield for traffic between the points designated.'

"When the lease was before the Commission the L. & N. urged that same be approved to enable it to relieve an intolerable car supply condition on certain of its lines (90 I. C. C., 111). The A. C. L. put forward the plea that it had no coal on its own rails and desired access over controlled lines to the coal fields of Kentucky and southwestern Virginia (90 I. C. C., 122). It was urged in addition that the opening of the new route which the lease would make available would enable the L. & N. to get into the western Carolinas in competition with the

Southern and that sundry benefits would accrue to the entire territory affected as a result (90 I. C. C., 127 and 128). Those opposing the lease, including the G. & F., contended that its approval would destroy certain existing and *potential* routes, withdraw effective competition as to large areas reached by the A. C. L., and give the A. C. L. an undue advantage in transportation in the southeast. The G. & F. objected on the specific ground that it intended to seek permission to build its Greenwood extension, and that, if the A. C. L. were permitted to lease the C. C. & O., this extension would be discriminated against in favor of the C. & W. C. by means of restrictions of joint rates" (R. 139, 140).

Then after reviewing the record in the Clinchfield Lease Case (90 I. C. C., 113), the Court said:

"In the light of this record, we think there can be no doubt of the correctness of the conclusion that the line of the C. C. & O. was to be continued as a neutral route and that in a case such as this roads handling through traffic passing over it were to be treated just as though the lease were not in existence and the C. C. & O. were an entirely independent road independently operated. Point is given to this conclusion when it is remembered that the G. & F. was one of the protestants at the time of the approval of the lease, and that

one of the 'potential' routes which it was sought to save from destruction, and which the conditions of the lease were evidently inserted to save, was the route to be provided by the connection of the Greenwood extension with the P. & N. After the lease was approved, the Commission approved the building of the Greenwood extension by the G. & F. at a cost of $3,300.000. And, while we do not think that the A. C. L. is estopped from making its present contention by failing to protest when the G. & F. sought a certificate of public necessity and convenience for the building of this extension, the fact that it did not do so although invited to appear by the Commission is a pertinent matter for consideration in determining the meaning of the conditions under which the C. C. & O. lease was approved; for only on the assumption that the extension was to participate in the through traffic passing over the C. C. & O. could the building of the extension be justified as a matter of public necessity and convenience. In authorizing the extension the Commission said:

" 'As an aid in securing better connections for the interchange of traffic it has been planned to extend the line from Augusta in a northerly direction to Greenwood, S. C., a distance of about 56 miles. By this extension

connection would be effected with the Seaboard Air Line and the Piedmont & Northern, the latter a strong independent electric line. Through these connections the Georgia & Florida will have direct access to the very important traffic-producing territory of northern South Carolina and central North Carolina, known as the Piedmont district. Through the medium of the Piedmont & Northern it will also have an advantageous connection with the Clinchfield Railroad at Spartanburg, S. C., and through this connection it expects to realize a substantial participation in the tonnage of coal and other commodities moving southbound over the Clinchfield destined to southern Georgia and Florida, and in the northbound movement of freight, principally citrus fruits and vegetables, from southern territory. The lines of the Southern Railway and the Charleston & Western Carolina, the latter a part of the Atlantic Coast Line system, also extend between Greenwood and Spartanburg, connecting with the Clinchfield, but as both of these lines have their own connections to the south the Georgia & Florida must look principally to the Piedmont & Northern for its interchange with the Clinchfield.' 117 I. C. C., 473, 475" (R. 141, 142).

In its report in this case the Commission said, speaking of Conditions 1, 3 and 4 in the Clinchfield Lease Case:

> "These conditions were imposed in consideration of representations made by the Piedmont, Georgia & Florida, and Seaboard, that if routes over the Clinchfield should be closed to them they would be deprived of traffic moving under joint rates which might otherwise move over their lines or future extensions thereof, and that existing and potentially competitive routes would thereby be destroyed. The Georgia & Florida also opposed the unconditional leasing of the Clinchfield because of its then announced intention of seeking our approval to extend its line from Augusta to Greenwood so as to obtain a connection with the Clinchfield at Spartanburg through the medium of the Piedmont, and expressed apprehension that if the Coast Line should be permitted to unconditionally lease the Clinchfield, the Greenwood extension, when constructed, would be discriminated against in favor of the Charleston by means of restrictions of joint rates" (R. 19, 20).

The Commission further said:

> "In authorizing that lease we said in reference to the Georgia & Florida and other opponents of the application—

" 'Those opposing the lease urge that the interest of each of the interveners and of the public in general will be best served if the Clinchfield is maintained as an independent line supported by its connection at each end. They request that any approval of the proposed acquisition be under condition that the Clinchfield be maintained as an open route, neutral or impartial, and equally available to all connections. They generally urge that unconditional approval of the application be refused.'

"The conditions imposed, and accepted by the Coast Line and the L. & N., were intended to provide in substance for the advantages thus requested, and fairly construed should have that effect. Their purpose was to preserve the relationships then existing between the Clinchfield, on the one hand, and the public and connecting lines of railroad, on the other hand, which were the relationships usually and normally existing between independent railroads and those whom it serves. This purpose is clearly indicated by the language, particularly the closing portion of Condition 3, reading:

" 'The present neutrality of handling traffic inbound and outbound by the Carolina, Clinchfield & Ohio Railway and its subsidiary, the Carolina, Clinchfield & Ohio

Railway of South Carolina, shall be continued so as to permit equal opportunity for service and routing or movement of traffic which is competitive with traffic of the applicants, or either of them, to and from all connecting lines reached by the line of the Clinchfield companies, without discrimination in service against such competitive traffic.'

"And by the corresponding portion of Condition 4, reading:

"'The intention of this provision being that the line of the Clinchfield and its subsidiaries shall be maintained as an open route equally available to all carriers connecting with the Clinchfield for traffic between the points designated.' (The points here referred to are points in territory north of the Ohio and points in southeastern territory)". (R. 28, 29).

III

The Commission and the District Court Correctly Interpreted the Terms "Connecting Lines Reached by the Line of the Clinchfield," and "Carriers, Now Connecting, or Which May Hereafter Connect, With the Line of the Clinchfield," as Including the Greenwood Extension of the Georgia & Florida Railroad Within the Scope of Their Meaning.

In answering the argument of appellants that they are entitled to restrict the joint rates from applying over the Greenwood extension, because it does not

directly connect with the Clinchfield, the Commission said:

> "There is no warrant for limiting the meaning of 'connecting lines' to the direct connections of the Clinchfield. The term is commonly used in referring to the lines in general making up a through route. There is in fact no other convenient term. The technical nature of this contention of respondents becomes apparent when it is considered that under their construction the conditions would necessarily apply to any extension of operations by the Piedmont, regardless of effect in short hauling the Coast Line. However, the conditions may not be so construed as to authorize or require the opening or maintenance of all other routes of which the Greenwood extension might physically be made a part. The test to be applied is that of the proper relationships between the Clinchfield, as an independent line, and its connections to and from southeastern territory" (R. 29, 30, 144).

This contention of appellants is somewhat similar to a contention made in the case of *St. Louis S. W. R. Co.* v. *United States*, 245 U. S., 136, where certain of the carriers concerned contended that an order of the Interstate Commerce Commission compelling the substitution of a through route and joint rate for the transportation of logs and lumber to Paducah, Ky.,

in place of a higher through rate previously charged by them, was void as to the complaining carriers because their lines did not reach Paducah, and for that reason they could not be guilty of discriminating against that city. In answer to the contention the Court said:

> "Carriers insist also that the order is void on the ground that since their 'rails do not reach Paducah, they cannot be guilty of discrimination against that city.' They, however, bill traffic via Cairo or Memphis through to Paducah in connection with the Illinois Central, thus reaching Paducah, although not on their own rails. And, thereby, they become effective instruments of discrimination. Localities require protection as much from combinations of connecting carriers as from single carriers whose 'rails' reach them. Clearly the power of Congress and of the Commission to prevent interstate carriers from practicing discrimination against a particular locality is not confined to those whose rails enter it. *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, supra.*"

The Greenwood extension in combination with the Piedmont & Northern Railway Company does connect with the Clinchfield, and reaches the Clinchfield over the rails of the Piedmont & Northern; and it was to exclude this route via the Greenwood extension from Augusta to Greenwood and via the Piedmont &

Northern from Greenwood to Spartanburg, from handling traffic, in connection with the Clinchfield, in competition with the Charleston & Western Carolina Railway Company that the restrictive schedules were filed (R. 14, 137).

To interpret the conditions as making the line of the Clinchfield available only to direct connections would very largely, if not altogether, defeat the purpose of the conditions, because direct connections must themselves have other connections, in order to use the Clinchfield as provided by the conditions.

So narrow an interpretation is not required by the express terms of the conditions; and would be at variance with their plain meaning and intent.

But even if the particular terms "connecting lines reached by the line of the Clinchfield," and "carriers, now connecting, or which may hereafter connect, with the line of the Clinchfield," were interpreted as referring primarily to direct connections, still appellants would not be justified in filing the restrictive schedules, because direct connections may use the Clinchfield for the traffic covered by the conditions in combination with their appropriate connections; and appellants (by the acceptance of the conditions) having consented to the use of the Clinchfield by direct connections could not urge Section 15(4) as a limitation on the Commission's authority to determine the reasonableness of joint rates for such traffic.

Atchison, Topeka & Santa Fe Ry. Co., et al., v. *United States, et al.*, 279 U. S., 768.

IV

The District Court Was Right in Giving Consideration to the Fact That the Commission's Interpretation of the Conditions, as Including the Greenwood Extension Within the Scope of Their Meaning, is in Accord With the Practical Interpretation Which the Interested Parties Had Given to the Conditions Prior to the Completion of the Greenwood Extension, and in Reliance Upon Which Interpretation the Greenwood Extension Was Constructed.

As shown by the report of the Commission and the opinion of the District Court the Georgia & Florida Railroad intervened in the Clinchfield Lease Case and opposed the unconditional leasing of the Clinchfield because of the announced intention of the Georgia & Florida to seek the Commission's approval to extend its line from Augusta to Greenwood so as to obtain a connection with the Clinchfield at Spartanburg through the medium of the Piedmont & Northern, and requested the Commission to impose conditions which would prevent the lessees from discriminating against the Greenwood extension, when constructed, by means of the restriction of joint rates (R. 20). The Commission in its report said that the conditions were intended to provide in substance for the advantages thus requested by the Georgia & Florida (R. 29); and the District Court said "that one of the 'potential' routes which it was sought to save from destruction and which the conditions of the lease were evidently inserted to save, was the route to be provided by the connection of the Greenwood extension with the Piedmont & Northern" (R. 141).

After the lease was approved, subject to the conditions, the Georgia & Florida made application to the Commission for authority to construct the extension, and the Commission approved its construction at a cost of $3,300,000, assigning as one of the principal reasons for the approval, "that through the medium of the Piedmont & Northern (the Georgia & Florida) would also have an advantageous connection with the Clinchfield Railroad at Spartanburg, S. C." (R. 22).

The Atlantic Coast Line Railroad Company was given notice of the Georgia & Florida Railroad's application for authority to construct the Greenwood extension, and although it had notice that the purpose of the projected extension was to give the Georgia & Florida a connection with the Clinchfield at Spartanburg, it failed to interpose any objection to the construction of the extension (R. 23, 141).

The District Court said that the failure of the Atlantic Coast Line to protest was "a pertinent matter for consideration in determining the meaning of the conditions under which the C. C. & O. lease was approved; for only on the assumption that the extension was to participate in through traffic passing over the C. C. & O. could the building of the extension be justified as a matter of public necessity and convenience."

In *Chicago* v. *Sheldon*, 9 Wall. 50, it was said:

> "In cases where the language used by the parties to the contract is indefinite or ambiguous and, hence, of doubtful construction, the practical interpretation by the parties them-

> selves is entitled to great, if not controlling, influence. The interest of each, generally, leads him to a construction most favorable to himself, and when the difference has become serious, and beyond amicable adjustment, it can be settled only by the arbitrament of the law. But, in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one."

In *Lowrey* v. *Hawaii*, 206 U. S., 206, 22, the Court said:

> "In *Brooklyn L. Ins. Co.* v. *Dutcher*, 95 U. S., 269, 24 L. ed. 410, it was said: 'There is no surer way to find out what parties meant than to see what they have done.' So obvious and potent a principle hardly needs the repetition it has received. And equally obvious and potent is a resort to the circumstances and conditions which preceded a contract. Necessarily in such circumstances and conditions will be found the inducement to the contract and a test of its purpose."

V

The Decree of the District Court Refusing to Enjoin the Enforcement of the Commission's Order Should be Sustained on the Additional Ground That the Clinchfield Railroad is Not Operated in Conjunction and Under a Common Management or Control With the Atlantic Coast Line Railroad Company and the Charleston & Western Carolina Railway Company Within the Meaning of Section 15(4) of the Interstate Commerce Act, as Amended by Transportation Act of 1920.

Appellants seek to justify the restrictive schedules on the ground that the Clinchfield Railroad and the Charleston & Western Carolina Railway Company are operated in conjunction and under a common management or control with the Atlantic Coast Line Railroad Company, and that therefore the Atlantic Coast Line Railroad Company cannot be required to embrace the Clinchfield Railroad in through routes which would have the effect of short hauling the Atlantic Coast Line Railroad Company and its system line, the Charleston & Western Carolina Railway (R. 2, 8). Therefore unless the Clinchfield Railroad is so operated the alleged justification of the restrictive schedules fails.

On the facts found by the Commission as to the relationships existing among the Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company, Clinchfield Railroad, and Charleston & Western Carolina Railway Company, the District Court held that the Clinchfield Railroad and the Charleston & Western Carolina Railway Company are

operated in conjunction and under a common management or control with the Atlantic Coast Line Railroad Company, and sustained the order of the Commission directing the cancellation of the restrictive schedules only on the ground that they are violative of the conditions of the Clinchfield Lease. But the point that the Clinchfield Railroad is not so operated is still open for consideration as an additional ground on which the decree of the District Court may be sustained (*Langnes* v. *Green*, 282 U. S., 551; *Story Parchment Co.* v. *Patterson Parchment Paper Co.*, 282 U. S., 555).

It is not alleged in the bill of complaint that the Atlantic Coast Line Railroad Company has any control over the Clinchfield Railroad except such as arises by virtue of the Clinchfield Lease, and by virtue of the Atlantic Coast Line Railroad Company's ownership of 51% of the stock of the Louisville & Nashville Railroad Company (R. 5, 6). The lease was made to the Atlantic Coast Line Railroad Company and Louisville & Nashville Railroad Company as joint lessees, and therefore cannot have the effect of constituting the Clinchfield Railroad a part of the Atlantic Coast Line System unless the Louisville & Nashville itself is a part of that System.

The Commission found:

> "The Coast Line owns 596,700 shares of the capital stock of the L. & N., or about 51% of the stock issued and outstanding. The Coast Line controls the L. & N. by electing the Board of Directors of the latter, who

> in turn elect the President and other officers. These officers are charged with the operation of the property subject to the general direction of the Board. The Coast Line and the L. & N. have the same person serving as chairman of their Boards of Directors, but they maintain separate organizations to operate the respective properties. They have close working arrangements with each other in the movement of traffic and in the matter of train service" (R. 23).

It is alleged in the bill of complaint that the Charleston & Western Carolina Railway Company is "operated in conjunction and under common management or control with the Atlantic Coast Line Railroad Company" (R. 3); but no similar allegation is made in respect to the Louisville & Nashville Railroad Company. As to it the allegation is, "The Atlantic Coast Line Railroad Company owns 51% of the stock of and thereby controls said Louisville & Nashville Railroad Company." This ownership of stock, of course, does not make the Louisville & Nashville Railroad Company a part of the Atlantic Coast Line Railroad Company's System, and the Commission has found that the Louisville & Nashville Railroad Company in fact maintains a separate organization to operate its property.

The fact that the Louisville & Nashville Railroad Company joined the Atlantic Coast Line Railroad Company in the application to the Commission for authority to acquire control by lease of the Clinchfield Railroad, and that among the reasons urged in sup-

port of the application were that the lease would enable the Louisville & Nashville Railroad Company to relieve an intolerable car supply condition on certain of its lines, and would open new routes enabling the Louisville & Nashville Railroad Company to get into the western Carolinas in competition with the Southern (R. 139), show that it was not the intent of the lease to make the Clinchfield Railroad a part of the Atlantic Coast Line Railroad Company's System.

Moreover Condition 1 of the Clinchfield lease provides that, "The applicant shall maintain and operate a separate organization for the combined properties of the Carolina, Clinchfield & Ohio Railway and its subsidiaries, so that the three companies shall constitute a separate operating unit, having a responsible management directly in charge of the operation of such companies."

Respectfully submitted,

W. S. O'B. ROBINSON, JR.,
Attorney for Piedmont and Northern Railway Company, *Appellee.*

JAMES M. HULL, JR.,
GEORGE B. BARRETT,
J. J. WILLINGHAM,
Attorneys for Georgia and Florida Railroad and W. V. Griffin and H. W. Purvis, as its Receivers, *Appellees.*

Charlotte, N. C.,
November 17, 1931.

SUPREME COURT OF THE UNITED STATES.

No. 88.—October Term, 1931.

Atlantic Coast Line R. R. Co., et al., Appellants, *vs.* The United States, et al.	On appeal to the District Court of the United States for the Western District of South Carolina.

[January 4, 1932.]

Mr. Justice Brandeis delivered the opinion of the Court.

This suit, under the Act of October 22, 1913, c. 32, 38 Stat. 208, 220, was brought in the federal court for western South Carolina, to set aside an order of the Interstate Commerce Commission dated June 9, 1930. *Restriction in Routing in Connection with the Georgia & Florida Railroad,* 165 I. C. C. 3. The plaintiffs are the Atlantic Coast Line Railroad, the Louisville & Nashville Railroad and the Charleston & Western Railroad. The defendants are the United States and, by intervention, the Commission, the Piedmont & Northern Railway and the Georgia & Florida Railroad. The order assailed was entered under § 15 (7) of the Interstate Commerce Act. It requires the cancellation of provisions in tariff schedules by which the plaintiffs seek to exclude the Georgia & Florida from participating as connecting carrier in through routes established over the Carolina, Clinchfield & Ohio Railway. The Commission held that the restrictive schedules violated the conditions under which that railroad had been leased to the Atlantic Coast Line and the Louisville & Nashville. *Clinchfield Railway Lease,* 90 I. C. C. 113. The District Court, three judges sitting, sustained the validity of the order and dismissed the bill. 48 F. (2d) 239. The case is here on direct appeal. We are of opinion that the decree should be affirmed.

The Clinchfield Railway extends in a southerly direction from Elkhorn City, Kentucky, to Spartanburg, South Carolina, a distance of 276.85 miles. The Atlantic Coast Line system lies to the

east and south. To the west and south lies the Louisville & Nashville, of whose stock 51 per cent is owned by the Coast Line. The Clinchfield is a link in many possible routes between points in the southeastern States and the north, in addition to those routes which are over the Atlantic Coast Line or the Louisville & Nashville. At Elkhorn City, the Clinchfield connects with the Chesapeake and Ohio Railway, whose system extends east, north and west. At Spartanburg, the Clinchfield connects with the Piedmont & Northern which extends in a southerly direction to Greenwood, South Carolina. And at Greenwood, the Piedmont & Northern connects with a recently built extension of the Georgia & Florida, which now has 464 miles of line in the three southeastern States. The restrictive schedules excluded from the joint rates traffic over the Clinchfield if routed via the Georgia & Florida. Such traffic was thereby subjected to the applicable combination of higher local rates. The effect of this was to prevent not only the Georgia & Florida but also the Piedmont & Northern, the intermediate carrier, from participating in such business, with the result that the traffic would be secured for the Charleston & Western, which the Atlantic Coast Line controls through stock ownership.

In 1923 the Atlantic Coast Line and the Louisville & Nashville applied to the Commission for leave jointly to lease the Clinchfield. The extension of the Georgia & Florida to Greenwood was then in contemplation. The Piedmont & Northern, and the Georgia & Florida opposed authorization of an unconditional lease, on the ground that if joint rates on traffic moving over the Clinchfield should be closed to them, they would be deprived of much traffic which might otherwise move over their lines or future extensions thereof. In order to preserve, among other things, the existing and possible through routes via the Clinchfield on railroads other than the Atlantic Coast Line and the Louisville & Nashville, the Commission, in authorizing the lease, made it subject to five conditions which the lessees accepted.[1] Condition 1 requires the main-

[1]The order of the Commission, entered June 3, 1924, provided: "That the making of said lease and exercise of any of the rights conferred by this order shall in all future proceedings, judicial as well as administrative, to which the carriers above named or any of them may be parties, be deemed and taken as conclusive evidence of their acceptance of, and agreement to abide by, the conditions enumerated in said report. . . ." 90 I. C. C. at 139. Compare Control of Alabama & Vicksburg Railway, 111 I. C. C. 161, 182.

tenance of a separate organization for the Clinchfield so that the road "shall constitute a separate operating unit." Condition 3 requires the continuance of existing routes and channels of trade, existing gateways for the interchange of traffic, and "the present neutrality of handling the traffic inbound and outbound" so as to permit equal service, routing, and movement of competitive traffic to and from all connecting lines reached by the Clinchfield.[2] Condition 4 requires the lessees to permit carriers then connecting with the line of the Clinchfield, or which may thereafter connect with it, to participate, without discrimination, in through routes and joint rates on traffic moving over the Clinchfield as an intermediate road between points at and beyond the Ohio River, on the one hand, and points in southeastern and Carolina territory, on the other; and that to this end the Clinchfield shall be maintained as an open route for traffic available to all carriers connecting with it.[3] The

[2] "3. So far as lies within the power of the applicants, existing routes and channels of trade and commerce heretofore established by other carriers in connection with the Clinchfield shall be preserved, existing gateways for the interchange of traffic with such other carriers shall be maintained, and the present neutrality of handling traffic inbound and outbound by the Carolina, Clinchfield & Ohio Railway and its subsidiary, the Carolina, Clinchfield & Ohio Railway of South Carolina, shall be continued so as to permit equal opportunity for service and routing or movement of traffic which is competitive with traffic of the applicants, or either of them, to and from all connecting lines reached by the line of the Clinchfield companies, without discrimination in service against such competitive traffic."

[3] "4. The applicants shall permit the line of the Clinchfield and its subsidiaries to be used as a link for through traffic, via existing gateways of interchange, or via such gateways as may hereafter be established under authority of the commission by means of the connecting lines which the Louisville & Nashville Railroad Company proposes to build, equally available to such other carriers, now connecting, or which may hereafter connect, with the line of the Clinchfield and its subsidiaries, as may desire to participate in through routes and joint rates between points in territory north and west of the line of the Clinchfield and points at and beyond the Ohio River on the one hand and points in the southeastern and Carolina territory on the other, under divisions to be agreed upon by the applicants, or either of them, and/or the Clinchfield organization, on the one hand, and by the other participating carrier or carriers on the other, and shall not discriminate as to rates, fares and charges against such participating carrier or carriers as compared with the applicants, or either of them; the intention of this provision being that the line of the Clinchfield and its subsidiaries shall be maintained as an open route equally available to all carriers connecting with the Clinchfield for traffic between the points designated."

order of June 9, 1930 here assailed, cancelled the restrictive schedules on the ground that they violated Conditions 3 and 4. The plaintiffs deny that the restrictive schedules are inconsistent with Conditions 3 and 4; and claim that if the schedules are inconsistent with the conditions, it is the conditions which are void.

First. The plaintiffs contend that the restrictive schedules are consistent with the conditions because the Georgia & Florida is not a carrier "connecting with the Clinchfield." The argument is that the Georgia & Florida does not connect, since its own rails do not physically abut on the Clinchfield's rails—the connection being made over the Piedmont & Northern, an intermediate carrier. There is no warrant for limiting the meaning of "connecting lines" to those having a direct physical connection with the Clinchfield. The term is commonly used as referring to all the lines making up a through route.[4]

Second. The plaintiffs contend that the restrictive schedules are consistent with the conditions, because these assure equality of treatment only to connections existing at the time the order was entered authorizing the lease, and the Greenwood extension, by means of which the Georgia & Florida connects with the Piedmont & Northern, was not built until several years thereafter. But the open route guaranteed by the conditions is not so limited. Condition 4 prescribes that the lessees "shall permit the line of the Clinchfield and its subsidiaries to be used as a link for through traffic, . . . equally available to such other carriers, now connecting, or which may hereafter connect, with the line of the Clinchfield and its subsidiaries, as may desire to participate in through routes and joint rates between points in territory north and west of the line of the Clinchfield and points at and beyond the Ohio River, on the one hand, and points in the Southeastern and Carolina territory, on the other."

Third. The plaintiffs contend that, as construed, Conditions 3 and 4 conflict with the provisions of § 15 (4) of the Act which prohibits the Commission from requiring a carrier to establish "without its consent" any through route which does not embrace

[4]Compare cases under the Carmack Amendment. Act of January 29, 1906, c. 3591, § 7, 34 Stat. 584, 595; Galveston, Harrisburg & San Antonio Ry. Co. *v.* Wallace, 223 U. S. 481, 489; Galveston, Harrisburg & San Antonio Ry. Co. *v.* Woodbury, 254 U. S. 357, 358.

substantially the entire length of its line (including lines of controlled carriers) between the termini of the proposed route.[5] The argument is that the order short-hauls traffic which would otherwise pass over the Charleston & Western and that this road is a part of the Atlantic Coast Line System. The Commission's order of June 3, 1924, which prescribed the conditions did not require the lessees to abandon any protection given by § 15 (4) in respect to their then existing lines. It was not an order establishing a through route within the meaning of § 15 (3). In respect to the Clinchfield, which the carriers sought to acquire, the Commission gave them the option of either consenting to certain through routing over that road or abandoning their plan to lease the road. In effect, the Commission found that without such a condition the proposed lease was not in the public interest. With that condition it was. Compare *Chicago Junction Case,* 264 U. S. 258, 265. It was within the powers of the Commission to make such a condition. Obviously the condition was not arbitrary. The provision was requested by the carriers interested; and it was required in order that competition, which the Commission deemed to be in the public interest, be preserved. Compare *Chesapeake & Ohio Ry. Co.* v. *United States,* 283 U. S. 35, 42. The limitation imposed by § 15 (4) of the Act upon the Commission's power under § 15 (3) to establish through routes is designed to protect the existing long

[5] "(4) In establishing any . . . through route the commission shall not . . . require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established. . . ." Act of June 19, 1910, c. 309, § 12, 36 Stat. 539, 552, amended by Act of February 28, 1920, c. 91, § 418, 41 Stat. 456, 485.

[6] The Commission has frequently attached similar conditions to orders authorizing acquisitions of control. See, *e. g.,* Chicago Junction Case, 71 I. C. C. 631, 639; Control of Alabama & Vicksburg Railway, 111 I. C. C. 161, 178, 179; Control of Columbia, Newberry & Laurens, 117 I. C. C. 219, 227; Control of Chicago Heights Terminal Transfer R. R. Co., 124 I. C. C. 753, 760; Acquisition of Control by Illinois Terminal Co., 138 I. C. C. 487, 498; Acquisition of Control by Wabash Ry. Co., 154 I. C. C. 155, 162, 163.

haul routes of carriers. Compare *United States* v. *Missouri Pacific R. R. Co.*, 278 U. S. 269, 277. It applies only when the Commission is exercising the power conferred by that paragraph. It is not a limitation upon the power of the Commission to approve new combinations of carriers.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.